(24,422)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 678.

THE GREENLEAF JOHNSON LUMBER COMPANY, APPELLANT,

vs.

LINDLEY M. GARRISON, SECRETARY OF WAR OF THE UNITED STATES, AND HENRY S. BRECKENRIDGE, ASSISTANT SECRETARY OF WAR OF THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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a UNITED STATES OF AMERICA, ss:

At a United States Circuit Court of Appeals for the Fourth Circuit, begun and held at the Court House, in the City of Richmond, on the First Tuesday in May, being the Fifth Day of the same Month, in the year of our Lord one thousand nine hundred and fourteen.

Present:

Hon. J. C. Pritchard, Circuit Judge.
Hon. Charles A. Woods, Circuit Judge.
Hon. Alston G. Dayton, District Judge.

Among other- were the following proceedings, to-wit:

LINDLEY M. GARRISON, Secretary of War of the United States, and Henry S. Breckenridge, Assistant Secretary of War of the United States, Appellants and Cross-Appellees,

vs.

GREENLEAF JOHNSON LUMBER COMPANY, a Corporation, Appellee and Cross-Appellant.

Cross-Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

Be it remembered that heretofore, to-wit, on December 18, 1913, the transcript of the record of the said District Court in the said entitled cause was transmitted to and filed in our said Circuit Court of Appeals here, which is as follows:

1 *Transcript of Record.*

Filed Dec. 18, 1913.

UNITED STATES OF AMERICA,
Eastern District of Virginia, To wit:

At a District Court of the United States for the Eastern District of Virginia, begun and held at the Court Room of the said Court, in the Court House and Post Office Building in the City of Norfolk, in said District, on the First Monday of November, being the Third Day of the same Month, in the year of our Lord one thousand nine hundred and thirteen.

Present: The Honorable Edmund Waddill, Jr., United States District Judge for the Eastern District of Virginia.

Among other- were the following proceedings, to-wit:

In Equity. No. 1739.

GREENLEAF JOHNSON LUMBER COMPANY, a Corporation, Complainant,
against
LINDLEY M. GARRISON, Secretary of War of the United States, and Henry S. Breckenridge, Assistant Secretary of War of the United States, Defendants.

Bill of Complaint.

Filed July 2nd, 1912.

To the Hon. Edmund Waddill, Jr., Judge of the District Court of the United States for the Eastern District of Virginia:

Your complainant, Greenleaf Johnson Lumber Company, respectfully represents unto your honor the following case:

(1) That it is a corporation created, organized and existing under and by virtue of the laws of the State of Virginia, with its principal office in the County of Norfolk, in said State, and is engaged in the business of buying, manufacturing and selling timber, lumber, piles and other like material.

2 (2) That your complainant is the owner of a tract of about eight acres of land, with all the riparian and other rights, ways, waters, water courses, privileges and appurtenances to the same in anywise appertaining or belonging, lying in the County of Norfolk, Virginia, on the eastern shore of the southern branch of the Elizabeth River, opposite the Norfolk Navy Yard of the United States Government. That the defendants, Henry L. Stimpson, Secretary of War, and Robert Shaw Oliver, Assistant Secretary of War, are citizens of the United States, residing in Washington, D. C.

(3) In the year 1873, Greenleaf Johnson and Richard T. Watters, who were then partners in said business, obtained from the Board of Harbor Commissioners of the port of Norfolk by resolution duly and legally adopted by it, permission and leave to construct a wharf or pier upon said land and into the said river to the Port Warden's line as then established. Soon thereafter they constructed, at large expense a wharf, or pier and fill partly composed of a fill made of earth, sawdust and shells and partly of piling and slabs, extending into the said river in accordance with the terms, conditions and provisions of said resolution of the said Board of Harbor Commissioners, the whole of said wharf being within the said Port Warden's line, and thereafter used the same in the conduct of their said business for loading and unloading their timber, lumber, piles and other merchandise to and from vessels transporting the same upon said river.

This property and the business then being conducted as aforesaid, was afterwards acquired by the firm of Greenleaf Johnson & Son, sometimes called Greenleaf Johnson & Company.

On the 24th day of November, 1883, the said wharf being then in need of repair the Board of Harbor Commissioners of the port of Norfolk adopted a resolution as follows:

"Resolved, That permission be granted to Greenleaf Johnson & Company to repair their wharf under the supervision of the engineer of this Board, provided such repairs are done within the limits of the Port Warden's line."

Accordingly, the engineer of said Harbor Board again surveyed and located the said Port Warden's line at that place, and pursuant to the permission granted by the said resolution, the said Greenleaf Johnson & Son repaired the said wharf at large expense, keeping the same within the limits of said Port Warden's line as required by said resolution, and its use was continued by them in the conduct of their said business. On March 13th, 1889, the said property was conveyed by the then owners to your complainant, which also acquired the said business of Greenleaf Johnson & Company. A duly certified copy of said deed is herewith filed, marked "G. J. L. Co.," and the same is asked to be read as a part of this bill.

3

Since that time your complainant has greatly expanded and enlarged its said business and has expended large sums of money in the repair and improvement of its said wharf and in adapting its said water-front to the needs of its business. Among other things, it has constructed thereon a large pound or basin, costing a very large sum of money, into which its logs, piles and other material are floated and stored; and your complainant avers that the said wharf and basin are indispensable to the successful conduct of its said business.

(4) Congress having by an Act approved March 4th, 1911, entitled "An Act making appropriations for the naval service for the year ending June 30th, 1912, and for other purposes," (36 Stat. at L., 1265, 1275), authorized the widening of the channel of the Elizabeth River in front of the Norfolk Navy Yard at a point where said wharf is situated, and the Secretary of the Navy desiring to use and occupy the channel of the Elizabeth River with the ships of the United States Navy at and in front of the said Navy Yard, the Secretary of War at the request of the Secretary of the Navy, not for the purpose of protecting or facilitating commerce at that place, because the said river between Port Warden's lines as then established was ample to accommodate the commerce of the port, but to enable the Secretary of the Navy to use the channel of said river for the private purposes of the United States Government, on June 12th, 1911, changed the location of said Port Warden's line, where your complainant's property is, from the location as theretofore established and recognized for many years, and re-established the same in such way that about 200 feet of your complainant's wharf and pier extend into the river outside of said new harbor line, so established by him, he claiming to act in so doing under and by virtue of authority conferred upon him by Section 12 of an *an* Act of Congress which became a law August 11th, 1888, entitled "An Act making

4 appropriations for the construction, repair and preservation of certain public works on rivers and harbors and for other purposes" (25 Stat. at L., 400, 425).

(5) Your complainant further shows that the Port Warden's line as located and established when said wharf and pound were constructed as hereinbefore stated, had for years before that time been located and recognized by both State and Federal officials and representatives in charge of navigation and the navigable waters at the port of Norfolk, and who were the authorized representatives of the said Governments respectively, with respect thereto, as being a line to which such structures could be built without interfering with navigation, and continued to be so recognized and acted upon by them respectively until June 12th, 1911, when the Secretary of War of the United States saw fit to change its location as hereinbefore alleged.

In the notice hereinafter referred to as Exhibit No. 1, the said line is admitted to have been the true harbor line recognized and adopted by the Federal government, it being expressly stated therein that the harbor line had been re-established at that point by the Secretary of War June 12th, 1911, and your complainant was therein notified "that the portion of the wharf hereinbefore described as lying westerly of the said harbor line as re-established June 12th, 1911, as hereinbefore stated, is regarded as a menace to navigation, and that unless the Greenleaf Johnson Lumber Company shall remove the same within sixty days after the service of this notice such portion of the said wharf as lies westerly of the said re-established harbor line will be removed by the United States in the prosecution of the work of improvement authorized by Congress as hereinbefore stated."

(6) Your complainant is advised and alleges that said wharf, pound and other improvements so put along and upon its waterfront, were constructed and have been maintained at that place in strict conformity with law and its legal rights, and that the same was and is property lawfully owned, held, maintained, used and occupied by the owners thereof from the time they were constructed as aforesaid, to the present time.

Recognizing at that time that this was property of your complainant and that it could not lawfully be taken for public purposes without just compensation, Hon. Beekman Winthrop, the Acting Secretary of the Navy, in July, 1911, opened negotiations with your complainant with reference to the purchase of said property

5 for the purposes aforesaid, and requested your complainant to name a price which it would be willing to accept for that portion of its said property which extended beyond the harbor line as re-established by the Secretary of War as aforesaid, in which he stated that the Department was willing to pay a fair and reasonable price therefor. Your complainant named a price which it considered a fair valuation of the property to be taken. The Acting Secretary of the Navy replied that he considered the price exorbitant, and thereupon your complainant requested him to indicate what he considered to be the value of the property. To this letter your

complainant received no reply, but shortly thereafter without indicating what amount he considered a fair price therefor the said Acting Secretary of the Navy placed the matter in the hands of the attorneys for the government who were directed to institute proceedings for the condemnation thereof, and on the 23rd day of November, 1911, proceedings were instituted in the District Court of the United States for the Eastern District of Virginia, at Norfolk, Virginia, for the condemnation of this property by the United States Government, thus again recognizing and admitting the fact that it was the property of your complainant and could not be taken without just compensation therefor.

In said petition and exhibits copies of which were duly served upon your complainant, and upon which issues as to the value of said property were duly made and joined between your complainant and the government, according to law, it is distinctly asserted and admitted that the property now sought to be taken was the property of your complainant, and that it was proposed to be taken, acquired and condemned for the purposes of the government, that the inability of the parties to agree upon the price and terms of the same rendered it necessary to institute proceedings for the condemnation thereof for the purposes aforesaid, and that your complainant was entitled to compensation therefor.

Your complainant made no resistance to said proceedings, but filed an answer to said petition, recognizing the right of the government to take the same for its purposes provided just compensation was paid therefor. Both parties proceeded to have the value of said property ascertained, your complainant selecting fair and competent men to examine the same and testify as to its value and what would be a just compensation to be paid therefor. At the same time the representatives of the United States Government on their part
6 had viewers and engineers to examine the same for that purpose, and the same was carefully and fully examined by them respectively.

After all this had been done and after the persons who had been sent to examine your complainant's property had reported their conclusions to the respective parties, and after a jury had been empanelled to try that issue and after the case had been set for trial, your complainant, to its surprise, was informed by the Clerk of said Court on the day before the case was to be heard, that the representatives of the government had on that day ordered that said condemnation proceedings be dismissed, and on the 21st day of March, 1910, the said condemnation proceedings were on motion of the government dismissed and stricken from the docket of the court.

Certified copies of said petition with certified copies of the exhibits filed therewith, and of said answer and order of dismissal attached thereto, are herewith filed marked Exhibit No. 1, and the same is asked to be read as a part of this bill.

(7) On May 3rd, 1912, Hon. Robert Shaw Oliver, Assistant Secretary of War, representing the Hon. Henry L. Stimpson, Secretary of War of the United States, and acting at the request of the Secretary of the Navy of the United States, caused a notice dated

April 22nd, 1912, to be served upon your complainant looking to the removal of that portion of the said wharf lying westerly of the said harbor line as re-established on June 12th, 1911, within sixty days after the service thereof, a copy of which notice is herewith filed marked Exhibit No. 2, and the same is asked to be read as a part of this bill.

Your complainant is informed and charges that this action on the part of the officials of the government in thus dismissing the said condemnation proceedings after the value of its property which the government now proposes to take had been thus ascertained and made known, was taken by them because they then determined to attempt to take and remove the same without paying any compensation whatever therefor, and that it was with that end in view that said notice was given.

Thus it will be seen that after having first offered to purchase said property from your complainant and having recognized its right to payment therefor, and again after having instituted proceedings for the condemnation thereof, and thus again recognized the same as private property to be taken for public purposes, it is now proposed by the said Secretary of War to take and destroy your complainant's property without paying any compensation at all.

7 A reference to said notice, Exhibit No. 2, will show that in so doing the said Secretary of War claims to be acting under authority of an Act of Congress entitled "An Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes," approved March 3rd, 1899 (30 Stat. at L., 1120, 1150), and in effect states that his action in so doing is based upon the fact that Congress had by an Act approved March 4th, 1911, entitled "An Act making appropriations for the naval service for the fiscal year ending June 30th, 1912, and for other purposes" (36 Stat. at L., 1265, 1275), authorized the widening of the channel of the Elizabeth River at the point where your complainant's wharf is situated, and that the execution of the project so authorized by Congress, requires the removal of all that portion of your complainant's wharf and other property extending beyond the said re-established harbor lines.

In this case, in order to accomplish the purposes of the government, it is proposed to convert the channel of the river now used for commerce and navigation into a storage harbor for the ships of the navy and to practically cut a new channel where your complainant's property now is in order to supply the demands of commerce, which will result from its occupancy of the present channel. The works of the United States Government at its Norfolk Navy Yard, and the use and occupancy of the harbor in front of its said property as hereinbefore stated, and as contemplated by the Secretary of the Navy, might be carried to the extent of obstructing commerce upon the river at that point when its said works are so completed and the said harbor so occupied and it is because of that fact, and on that account alone, that it is asserted in said notice that your complainant's wharf, as now located, will become a

menace to vessels using the channel in its vicinity, and it is for this reason only that the government proposes to take and remove the same.

Your complainant is advised and avers that even if the Secretary of War for the protection and advancement of commerce, had authority to order the removal and the taking of said property without compensation, which is denied, yet the Federal Government in the development or establishment of its private works, cannot appropriate and obstruct the navigable waters upon which they are situated, so as to interfere with and hinder navigation and render a change in the channel of the river necessary to accommodate commerce, and then for that purpose take private
8 property without compensation to the owners thereof, under the pretext of protecting and advancing navigation and clearing navigable waters of obstructions therein.

(8) Your complainant is further advised and alleges that the Act of Congress approved March 3rd, 1899 (30 Stat. at L., 1121, 1150), under the authority of which the Secretary of War claims to be acting in thus taking and removing your complainant's property, does not confer the power or authority upon him which he proposes and threatens to exercise, and that this contemplated and threatened action upon his part in so taking and removing the same is not within the authority conferred by said Act, and that such action by him, or by those acting under his direction or authority, will amount to an illegal assumption of authority upon his and their parts, which a court of equity will enjoin.

(9) Your complainant is further advised and charges that if the terms of the statute were broad enough to authorize the Secretary of War to thus take and remove your complainant's property, the same is to that extent unconstitutional and void, first, because it authorizes the taking of private property for public use without just compensation; and secondly, because no provision is made therein for any hearing of your complainant in defense of his said property and property-rights, and the said statute therefore, if so construed, authorizes the taking of your complainant's property without due process of law.

(10) Your complainant further shows that its said wharf, pound and other works upon its water-front at that place, which are thus proposed to be taken and removed are exceedingly valuable as property belonging to your complainant and constitute the only access which it has to navigable water and the only means by which it can receive and deliver its material and the products of its business from and to vesels transporting the same; and if its said property is taken and removed as contemplated and required by said notice, its works and business will be cut off from water deep enough to accommodate vessels, and the valuable pound or storage place now upon its said property which it has constructed at heavy expense, will be taken away and the value of its business
9 will be thus practically destroyed and this contemplated and threatened action on the part of the Secretary of War

in thus removing said wharf and pound will subject your complaintiff to irreparable injury.

(11) Your complainant further shows that unless enjoined by this honorable court, the Hon. Henry L. Stimpson, Secretary of War of the United States, acting by and through the Hon. Robert Shaw Oliver, Assistant Secretary of War, claiming to be acting under and by virtue of the authority conferred upon them by the said Act of Congress approved March 3rd, 1899, but without any legal right or authority whatever, will cause and direct agents and employees of the government whose names are unknown to your complainant, to proceed on July 3rd, 1912, to remove said wharf and pound and other property of your complainant outside of said re-established harbor lines, as stated and threatened in said notice, Exhibit No. 2, whereby irreparable injury will be done to your complainant and its said property, and the same will be thus illegally taken and destroyed without any provision being made for any compensation to your complainant therefor.

Forasmuch, as your complainant is without remedy save in a court of equity, where such matters are alone and properly cognizable and relievable, it prays that the said Henry L. Stimpson, Secretary of War of the United States; Robert Shaw Oliver, Assistant Secretary of War of the United States, be made parties defendant to this bill and required to answer the same, their answers under oath being hereby expressly waived; that due and proper process be issued, summoning each of said defendants to appear and answer this bill; that the said Henry L Stimpson, Secretary of War, the said Robert Shaw Oliver, Assistant Secretary of War, as well as their agents and employees and all other persons acting under their autority or direction, as well as all other persons who may attempt to do so, be enjoined and restrained from taking and removing, or in any way interfering with your complainant's said wharf, pound, structures, or other property along or upon the waterfront of its said property upon the southern branch of the Elizabeth River as mentioned and described herein, unless and until the same has been taken by the Government by due process of law, and just compensation has been paid therefor to your complainant in the manner authorized and required by the Constitution and laws of the United States, and that your complainant may have such other, further general and special relief as to equity may seem meet, and the nature of its case may require.

And it will ever pray, etc.

GREENLEAF JOHNSON LUMBER COMPANY,
INCORPORATED,
By J. T. DEAL, *President.*
STARKE, VENABLE & STARKE,
JEFFRIES, WOLCOTT, WOLCOTT & LANKFORD,
Attorneys for Complainant.

[CORPORATE SEAL.]

STATE OF VIRGINIA,
City of Norfolk, To wit:

I, M. G. Mulvey, a Notary Public in and for the city aforesaid, in the State of Virginia, do hereby certify that J. T. Deal, President of the Greenleaf Johnson Lumber Company, personally appeared before me in my said city and made oath that the facts stated in the foregoing bill are true.

Given under my hand and official seal this 1st day of July, 1912.
My commission expires April 10th, 1916.

M. G. MULVEY,
Notary Public.

[NOTARIAL SEAL.]

EXHIBIT NO. 1 WITH BILL.

Filed July 2nd, 1912.

In the District Court of the United States for the Eastern District of Virginia.

THE UNITED STATES OF AMERICA
vs.
A CERTAIN PIECE OF LAND LOCATED IN THE SOUTHERN BRANCH of the Elizabeth River Near Norfolk, Virginia, and Known as the Greenleaf-Johnson Lumber Company Fill.

To the Honorable Edmund Waddill, Jr., Judge of said Court:

The petition of the United States of America respectfully represents:

11 I.

That on the 4th day of March, 1911, an Act of Congress, authorizing the purchase of land and widening of the channel at the Norfolk Navy Yard, Virginia, was duly approved (36 Statutes at Large, page 1275).

II.

That, in order to carry out the provisions of said Act, the United States desire to acquire title to a certain piece of land, situated in the Southern Branch of the Elizabeth River, Virginia, opposite the Norfolk Navy Yard, and known as the Greenleaf-Johnson Lumber Company Fill, the acquisition of said property being desired more especially for the purpose of widening the channel of the said Southern Branch of the Elizabeth River at the point aforesaid.

III.

That the owner and tenant of the freehold whose property is sought to be taken in and by these proceedings, so far as known to

your petitioners, is shown by the memorandum filed herewith marked "Exhibit No. 1," the said owner and tenant, the Greenleaf-Johnson Lumber Company, as your petitioners are advised and believe, is a corporation chartered by and doing business under the laws of the State of Virginia.

IV.

That the interest purposed to be acquired and condemned in the said land is a fee-simple interest.

V.

That the petitioners through their proper offices, have made an effort to agree with the owner of the property, needed as aforesaid, but have been unable to agree upon the price and terms of the same, thus rendering it necessary to institute proceedings for condemnation of the said property for the purpose hereinbefore indicated.

VI.

That the description of the said piece of land, its metes and bounds, quantity, &c., fully appears from the exhibit filed with this petition marked "Exhibit No. 2," and from a plat of said property, also filed with this petition marked "Exhibit No. 3."

VII.

That said petition is filed, and these proceedings instituted, by direction of the Attorney General of the United States, upon
12 the application of the Secretary of the Navy of the United States, as provided in the Act of August the 1st, 1888, chapter 728, 25 Statutes at Large, page 357, et seq., entitled "An Act to Authorize Condemnation of Land for Sites of Public Buildings, and for other purposes."

Wherefore petitioners pray that it be ascertained by the proper method of procedure in this cause what will be a just compensation for the said property; that the same may be condemned and title thereto in fee-simple vested in petitioners, the United States of America; and that your petitioners may have all such other, further and general relief in the premises as they may be entitled to.

And your petitioners will ever pray, &c.

UNITED STATES OF AMERICA,
By L. L. LEWIS, *U. S. Attorney,*
By ROBT. H. TALLEY, *Asst. U. S. Atty.*

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

This day personally appeared before me, in said district, Robert H. Talley, Assistant United States Attorney for the Eastern

District of Virginia, and made oath that, to the best of his knowledge, information and belief the statements made in the foregoing petition are true.

Given under my hand this 23rd day of November, 1911.

JOSEPH P. BRADY,
Clerk of the District Court of the United States for the Eastern District of Virginia.

In the District Court of the United States for the Eastern District of Virginia.

THE UNITED STATES OF AMERICA
vs.
A CERTAIN PIECE OF LAND LOCATED IN THE SOUTHERN BRANCH of the Elizabeth River Near Norfolk, Virginia, and Known as the Greenleaf-Johnson Lumber Company Fill.

13 Whereas the United States desires to acquire title by condemnation to a certain piece of land, situated in the Southern Branch of the Elizabeth River, Virginia, held and owned by Greenleaf-Johnson Lumber Company, which is needed for public uses and purposes; that is to say, for deepening and widening the said South Branch of the Elizabeth River, as authorized by act of March 4, 1911, 36 Stat., 1275 comes now the undersigned, the United States Attorney for the Eastern District of Virginia, acting in this behalf by direction of the Attorney General of the United States, and files in the clerk's office of this court:

1. A memorandum showing the name and residence of the owner of the said land, marked "Exhibit No. 1."

2. A memorandum describing the said land, showing the quantity thereof, its metes and bounds, etc., marked "Exhibit No. 2."

3. A plat of survey of the said land, marked "Exhibit No. 3."

Said exhibits are filed in conformity to the statute of Virginia in such case made and provided.

L. L. LEWIS,
U. S. Attorney,
By ROBT. H. TALLEY,
Asst. U. S. Attorney.

Memorandum Showing the Name and Residence of the Owner of the Said Land.

The owner of the land sought to be condemned, so far as is known, and its residence is as follows:

14 Greenleaf-Johnson Lumber Company, a corporation, Norfolk, Virginia.

L. L. LEWIS,
U. S. Attorney,
By ROBT. H. TALLEY,
Asst. U. S. Attorney.

Memorandum Describing the said Land, Showing the Quantity, etc.

The said lot of land is situated in the Southern Branch of the Elizabeth River, Virginia, opposite the Norfolk Navy Yard, and described as follows:

Beginning at a point in the Southern Branch of the Elizabeth River, nearly opposite Dry Dock No. 3 of the Norfolk Navy Yard, and lying between the Pierhead Line, approved June 12, 1911, and the Pierhead Line in existence prior to June 12, 1911, the said fill being approximately 600 feet in length, for a more particular description of which reference is hereby made to a plat of survey, filed with the petition of the United States of America as "Exhibit No. 3."

L. L. LEWIS,
U. S. Attorney,
By ROBT. H. TALLEY,
Asst. U. S. Attorney.

In the District Court of the United States for the Eastern District of Virginia.

THE UNITED STATES OF AMERICA
vs.
A CERTAIN PIECE OF LAND IN THE SOUTHERN BRANCH OF THE Elizabeth River Near Norfolk, Virginia, and Known as the Greenleaf-Johnson Lumber Company Fill.

To the Greenleaf-Johnson Lumber Company, a corporation, and all parties whom it may concern:

You are hereby notified that the United States of America, by their attorney, will, at twelve o'clock M., on the 15th day
15 of February, A. D. 1912, or as soon thereafter as counsel can be heard, apply to the District Court of the United States for the Eastern District of Virginia, sitting in the Postoffice Building at Norfolk, Virginia, for the impanelling of a jury, or to make such order as may be necessary and proper in such a case, to ascertain what will be just compensation for the land, fill and other property in the Southern Branch of the Elizabeth River, near Norfolk, Virginia, or for the interest or estate therein proposed to be condemned, for the uses of the United States of America, and to award damages, if any, resulting to the adjacent or other property owned by you, or the property of any other person, beyond the peculia- benefits that will accrue to you, respectively, from the construction and maintenance of the improvement proposed to be made, and the work to be done by the United States of America—the ownership, location and description of which property, and the particular nature of which improvement and work will fully appear

by reference to a petition and exhibits therewith filed in the clerk's office of said court on the 23rd day of November, A. D. 1911.

UNITED STATES OF AMERICA,
By ROBT. H. TALLEY,
Asst. U. S. Attorney.

In the District Court of the United States for the Eastern District of Virginia.

THE UNITED STATES
vs.
A CERTAIN PIECE OF LAND LOCATED IN THE SOUTHERN BRANCH of the Elizabeth River Near Norfolk, Virginia, and Known*ed* as the Greenleaf-Johnson Lumber Company Fill.

This day came the Greenleaf-Johnson Lumber Company, by its counsel, and tendered its answer to the petition heretofore filed in this cause; and thereupon came the United States, by the District Attorney, and moved the court to dismiss the petition, and this proceeding.

Upon consideration whereof the court doth allow said answer to be filed and doth order that the said petition, and this proceeding, be, and the same is hereby dismissed and removed from the
16 docket of this court, without prejudice to the United States to institute such further proceeding as it may deem expedient.

EDMUND WADDILL, JR.,
U. S. District Judge.

Norfolk, Va., March 21, 1912.

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss.:

I, Joseph P. Brady, Clerk of the District Court of the United States for the Eastern District of Virginia, do hereby certify that the foregoing are true and correct copies of the petition of the United States, memorandum and exhibits Nos. 1 and 2 therewith, notice of condemnation proceedings, and order of dismissal, in the condemnation proceedings of The United States of America vs. a certain piece of land located in the Southern Branch of the Elizabeth River near Norfolk, Virginia, and known as the Greenleaf-Johnson Lumber Company fill.

In testimony whereof, I hereunto set my hand and affix the seal of the said court, at Norfolk, this 29th day of June, 1912.

[SEAL.]

JOSEPH P. BRADY, *Clerk,*
By D. ARTHUR KELSEY,
Deputy Clerk.

EXHIBIT No. 2 WITH BILL.

Filed July 2nd, 1912.

WAR DEPARTMENT,
WASHINGTON, D. C., April 22, 1912.

Take Notice That:

Whereas, The Old wharf of the Greenleaf-Johnson Lumber Company of Norfolk, Virginia, projecting into the southern branch of the Elizabeth River at a point opposite Dry Dock No. 3 of the Norfolk Navy Yard at Norfolk, Virginia, was placed in said river without authority of Congress; and a portion of the said wharf extends beyond the harbor line as re-established at this point by the Secretary of War June 12, 1911; and the wharf, in its present condition, is a menace to all vessels using the channel in its vicinity.

17 And whereas, Congress by Act approved March 4, 1911, entitled "An Act making appropriations for the naval service for the fiscal year ending June 30, 1912, and for other purposes" (36 Stat., 1265, 1275), has authorized the widening of the channel of the river at the point where the said wharf is situated; and the execution of the project so authorized by Congress requires the removal of all that portion of said wharf extending beyond the said re-established harbor line—the portion of said wharf required to be removed measuring about 270 feet alongthe southerly side and about 122 feet along its northerly side, and including all that part of the wharf lying westerly of the harbor line as re-established June 12, 1911, as hereinbefore stated.

Now, therefore, this is to certify that the Secretary of War, under authority of the Act of Congress, entitled "An Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes," approved March 3, 1899 (30 Stat., 1121, 1150), hereby notifies the said Greenleaf-Johnson Lumber Company that the portion of said wharf hereinbefore described as lying westerly of the said harbor line as re-established June 12, 1911, as hereinbefore stated, is regarded as a menace to navigation, and that unless the said The Greenleaf-Johnson Lumber Company shall remove the same within sixty days after the date of service of this notice, such portion of the said wharf as lies westerly of the said re-established harbor line will be removed by the United States in the prosecution of the work of improvement authorized by Congress as hereinbefore stated.

ROBERT SHAW OLIVER,
Ass't Secretary of War.

L. W. C.-McK.

Answer of the Greenleaf-Johnson Lumber Company.

In the District Court of the United States for the Eastern District of Virginia.

UNITED STATES OF AMERICA

vs.

A CERTAIN PIECE OF LAND LOCATED IN THE SOUTHERN BRANCH of the Elizabeth River and Known as the Greenleaf-Johnson Lumber Company Fill.

The answer of the Greenleaf-Johnson Lumber Company,
18 a corporation chartered under the laws of the State of Virginia, by J. T. Deal, its President, the said corporation being the owner in fee of the property hereinafter mentioned and sought to be acquired by the United States Government, to a petition filed in the United States District Court for the Eastern District of Virginia, on the 23rd day of November, 1911, at Norfolk, in said District, for the condemnation of a certain piece of land located on the Southern Branch of the Elizabeth River near Norfolk, Virginia, and known as "The Greenleaf-Johnson Lumber Company Fill," which is fully and particularly described in said petition and exhibits filed therewith. The Greenleaf-Johnson Lumber Company, the tenant of the freehold of said property, by J. T. Deal, its President, admits the service upon him of due and legal notice of the filing of said petition, and states that he recognizes the regularity of the proceedings and is willing that this court should proceed to acquire said property in the manner prescribed by law.

Further answering respondent says that:

I. The allegations of paragraph 1 of said petition are true.

II. That the allegations of paragraph 2 so far as this respondent is informed, are true.

III. The statements made in paragraph 3 are true.

IV. It is true that the interest proposed to be acquired and condemned in said land is a fee simple interest in this respondent.

V. The statements made in paragraph 5 of said petition are true, the petitioner being unwilling to pay for said property what it was reasonably worth.

VI. The allegations of paragraph 6 are admitted.

VII. The allegations of paragraph 7 are admitted.

VIII. This respondent says that the property proposed to be taken by the petitioner is exceedingly valuable and in addition to the actual value of the property which will be lost to your petitioner by the taking thereof, the residue of said property from
19 which the same is proposed to be taken will be greatly and seriously damaged by reason of the condemnation of the property proposed to be taken in said petition, for all of which your petitioner claims due and fair compensation.

And now having fully answered it prays to be hence dismissed with its reasonable costs.

GREENLEAF-JOHNSON LUMBER COMPANY,
By J. T. DEAL, *Its President.*

STATE OF VIRGINIA,
City of Norfolk, To wit:

I, —— ——, a Notary Public in and for the City of Norfolk, and State of Virginia, do hereby certify that J. T. Deal, President of The Greenleaf-Johnson Lumber Company, personally appeared before me in my said city and State and made oath before me that the statements made in the foregoing answer are true.

Given under my hand this — day of March, in the year 1912.

My commission expires — ——.

——— ———,
Notary Public.

EXHIBIT "G. J. L."

Filed July 2nd, 1912.

This Deed made the 13th day of March in the year eighteen hundred and eighty-nine between Greenleaf Johnson, Sr., and Jessie C., his wife, Howard N. Johnson and Mary his wife, and Greenleaf Johnson, Jr., and Annie E., his wife, of the — of — in the State of Virginia of the first part, and the Greenleaf Johnson Lumber Company of the second part. Witnesseth, that in consideration of the sum of Ten Thousand (10,000) dollars, the said parties of the first part, do grant with general warranty, unto the said the Greenleaf Johnson Lumber Company the following property, to wit: a certain tract, piece or parcel of land, situated in the County of Norfolk, in the State of Virginia, called Sandy Point containing about
20 eight (8) acres more or less, the same being the Northwestern Point of a tract or parcel of land on which Carter B. Poindexter now or formerly resided, the boundaries and dimensions of which said tract or parcel of land called Sandy Point are accurately defined and set forth, in a certain plat of survey therof filed with and annexed to and recorded with a certain deed of bargain and sale from the said Carter B. Poindexter and Mary E. his wife, to Greenleaf Johnson, Richard T. Waters and John Ransom, dated the 21st day of February, A. D. 1870 and duly of record in the Clerk's Office of the County Court of Norfolk County D. B. 101, page 140 which said tract of land called Sandy Point, by successive conveyances passed to and became the property of the said parties of the first part with all and singular the rights, ways, waters, water courses, privileges and appurtenances to the same in anywise appertaining or belonging. The said parties of the first part covenant that they are seized in fee simple of the said land with its appurtenances; that they have

the right to convey the said land to the grantee; that the grantee shall *shall* have quiet possession of the said land free from all encumbrances; that they the said parties of the first part, will execute such further assurances of the said land as may be requisite; and that they have done no act to encumber the said land.

Witness the following signature- and seal-:

GREENLEAF JOHNSON.	[SEAL.]
JESSIE C. JOHNSON.	[SEAL.]
HOWARD N. JOHNSON.	[SEAL.]
MARY N. JOHNSON.	[SEAL.]
GREENLEAF JOHNSON, JR.	[SEAL.]
ANNA E. JOHNSON.	[SEAL.]

CORPORATION OF THE CITY OF NORFOLK, *To wit:*

I, Wm. W. Wilson, a Notary Public for the Corporation aforesaid, in the State of Virginia, do certify that Howard N. Johnson and Mary N. Johnson, his wife, whose names are signed to the writing above, bearing date on the 13th day of March, in the year eighteen hundred and eighty-nine, have acknowledged the same before me in my corporation aforesaid.

Given under my hand this 13th day of March, in the year 1880.

WM. W. WILSON,
Notary Public.

21 STATE OF MARYLAND,
City of Baltimore, To wit:

I, G. Evett Reardon, a Commissioner appointed by the Governor of the State of Virginia, for the said State of Maryland, certify that Greenleaf Johnson and Jessie C. Johnson, his wife, and Greenleaf Johnson, Jr., and Annie E., his wife, whose names are signed to the writing hereto annexed, bearing date on the 13th day of March, 1889, have acknowledged the same before me in my State aforesaid. I do also certify that Jessie C. Johnson and Annie E. Johnson, the wives of Greenleaf Johnson and Greenleaf Johnson, Jr., whose names are signed to the writing hereto annexed bearing date on the 13th day of March, 1889, personally appeared before me in the State aforesaid, and being examined by me privily and apart from their husbands and having the writing aforesaid fully explained to them, they the said Jessie C. Johnson and Annie E. Johnson acknowledged the same writing to be their act, and declared that they had willingly executed the same and do not wish to retract it.

Given under my hand this 8th day of April, Anno Domini, 1889.

[SEAL.] G. EVETT REARDON,
Commissioner for Virginia in the State of Maryland,
Residing at Baltimore City, 33 Lexington St.

VIRGINIA:

In the Clerk's Office of Norfolk County Court, July 8th, 1889. This deed was presented in office with the certificate annexed and admitted to record.

Teste:

ALVAH H. MARTIN, *Clerk.*

STATE OF VIRGINIA,
County of Norfolk, To wit:

I, Alvah H. Martin, Clerk of the Circuit Court of Norfolk County, State aforesaid, do certify that the foregoing is a true copy from the records of my office.

Given under my hand and seal of said court this 1st day of July, 1912.

[SEAL.] ALVAH H. MARTIN, *Clerk.*

22 STATE OF VIRGINIA:
County of Norfolk, To wit:

I, J. T. Lawless, Judge of the *Court* Court of Norfolk County, in the State of Virginia, do certify that Alvah H. Martin, who hath given the preceding certificate, is Clerk of the said Court, and that the said attestation is in due form.

Given under my hand this 1st day of July, A. D. 1912.

J. T. LAWLESS,
Judge of the Circuit Court of Norfolk County.

STATE OF VIRGINIA,
County of Norfolk, To wit:

I, Alvah H. Martin, Clerk of the Circuit Court of Norfolk County, in the State of Virginia, do hereby certify that Hon. J. T. Lawless, whose genuine signature appears to the certificate above, is the only Judge of the said Circuit Court, and that all his official acts as such are entitled to full faith and credit.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office this 1st day of July, A. D. 1912, in the 136th year of the Commonwealth of Virginia.

[SEAL.] ALVAH H. MARTIN, *Clerk.*

Demurrer of United States.

Filed October 19th, 1912.

The demurrer of the defendants, the United States of America, Henry L. Stimpson, Secretary of War of the United States, and Robert Shaw Oliver, Assistant Secretary of War of the United States, to the bill of complaint filed against them in the District Court of the United States for the Eastern District of Virginia by the Greenleaf Johnson Lumber Company.

The defendants, by protestation, not confessing nor acknowledging all or any of the matters and things in said bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, demur to the said bill, and for cause of demurrer show:

23

1.

The bill of complaint does not conform to the requirements of Equity Rule 20; in that, it does not, in the introductory part, contain the names, places of abode, and citizenship of all the parties. In the caption of the bill the United States are named as defendants; in the prayer Stimpson and Oliver, in their official capacities above set forth, are named as defendants.

2.

The bill does not contain a prayer for process as required by Equity Rule 23.

3.

The bill does not set forth that the respondents, Henry L. Stimpson, Secretary of War, and Robert Shaw Oliver, Assistant Secretary of War, are within the jurisdiction of this court; their place of abode is not given, and this court has no control over their persons, so far as the bill shows, and therefore the court cannot *and* compel obedience to its decree, and consequently is without jurisdiction in the premises.

4.

The work sought to be enjoined, as shown by the bill, is one of a public nature, and taken as a whole the bill shows that the Government, in clearing the Elizabeth River of obstruction, is only exercising its rights under the constitution of the United States. Neither the United States, nor any officer thereof, can be enjoined from proceeding with such work.

5.

The court is without jurisdiction to define, declare or annul harbor lines established by the Secretary of War pursuant to authority

vested in him by law; and the granting of a permanent injunction as prayed for, in effect, accomplishes these unlawful results.

6.

The proceeding is against the United States, and the court is without jurisdiction to entertain it.

24 7.

The bill is also bad in substance, because (*a*) it shows that the property sought to be taken is an improvement, a wharf or a fill extending out from the complainant's land into the Elizabeth River a navigable stream, and although the title to the shore may be in the complainant, the submerged soil extending from the shore into the said river is subject to the servitude in respect of navigation and commerce created in favor of the Federal government by the Constitution, and the acts of the government in exercising its rights cannot be enjoined; (*b*) it admits that the wharf or fill projects beyond harbor lines regularly established; (*c*) it shows a state of facts inconsistent with the proper navigation of the stream at the point in question and an obstruction thereto; and (*d*) it shows a state of facts which necessarily bring into play the power of the Government to protect navigation and commerce on all navigable waterways of the United States against unreasonable obstruction.

8.

And other causes and reasons which may be assigned at the hearing.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, the defendants demur thereto, and demand the judgment of this honorable court whether they shall be compelled to make any other or further answer to said bill; and they pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

D. LAWRENCE GRONER,
U. S. Attorney.

ROBT. H. TALLEY,
U. S. Asst. Attorney.

UNITED STATES OF AMERICA,
Eastern District of Virginia, To wit:

E. E. Winslow, being duly sworn, deposes and says: I am in charge of improvements to Norfolk, Virginia, harbor under the authority and direction of the Secretary of War of the United States, who is one of the defendants in the above entitled
25 suit, and for him and in his stead, I further depose and say that the above demurrer is not interposed for delay.

E. EVELETH WINSLOW.

Subscribed and sworn to before me this 19th day of October, 1912.

D. ARTHUR KELSEY,
Deputy Clerk U. S. Dist. Court, East Dist. Va.

I, Robert H. Talley, hereby certify that I am Assistant U. S. Attorney for the Eastern District of Virginia, and in such capacity am of counsel for the defendants above named, and that in my opinion, the above demurrer is well founded in point of law, and proper to be filed in the above cause.

ROBT. H. TALLEY,
Asst. U. S. Attorney.

Excerpt from Injunction Order.

Entered July 16th, 1912.

It is ordered that a temporary injunction be awarded, enjoining and restraining Henry L. Stimson, Secretary of War of the United States; Robert Shaw Oliver, Assistant Secretary of War of the United States, as well as their agents and employes and all other persons acting under their authority or direction, as well as all other persons who may attempt to do so, from taking and removing or in any way interfering with the complainant's wharf, pound, structures, or other property along or upon the water front of its property upon the Southern Branch of the Elizabeth River, as mentioned and described in the said bill, until the further order of this court.

Opinion of the Court.

Filed February 20th, 1913.

Messrs. Starke, Venable & Starke, and Jeffries, Walcott, Walcott & Lankford, for complainant; D. Lawrence Groner, United States Attorney, for the defendant.

26 The complainant, Greenleaf Johnson Lumber Company, is the owner in fee of certain property bordering on the Southern Branch of the Elizabeth River, opposite the government navy yard at Norfolk, Virginia. It is engaged in the manufacture and sale of lumber, and in the conduct of its business, erected many years ago, in front of its highland, extending out into the river, a wharf and fill, the former being used for the shipment of the product of its mills, and the latter being used for the purpose of floating and holding rough logs prior to their manufacture. All of these improvements were made pursuant to authority obtained from the Board of Harbor Commissioners of the Port of Norfolk and Portsmouth, and the same, as originally constructed, extended out from the shore into the river, to an imaginary line known in the harbor as the "Port Warden's Line," in effect the channel line,

or line of navigability. At the time these improvements were made, and for many years subsequent thereto, the Government had established no harbor line or line of navigability in this branch of the river, but in 1890, pursuant to an Act of Congress, the Secretary of War established such a line and as established it was co-incident in all respects with the previously established State line, and the property in dispute here was entirely within, or inland of the same, and the line so continued in force and operation until February, 1911, when, after due hearing, the Secretary of War changed its location, so that as changed and re-established, it ran along the front of complainant's property some two hundred and odd feet inland of the original line, the effect of which was to leave outside of such re-established line approximately an equal number of feet of complainant's wharf and fill.

Shortly after this, the Secretary of War gave notice to complainants to remove within ninety days its structure- extending out beyond the re-established line, upon penalty of having them removed by the Government, his action in this regard being, it is claimed, in accordance with an Act of Congress of March 4th, 1911, 36 Stat. L., 1265-1275, making appropriation for the widening of the channel of the Southern Branch of the Elizabeth River opposite the property of the complainant. Complainant thereupon obtained from this court an injunction order restraining the Secretary of War, his agents and servants, from interfering with the possession of the complainant of the property which the Government was seeking to destroy. The Secretary of War duly appeared through the District Attorney, filed a demurrer to the bill of complaint, and by
27 agreement of parties at the hearing, it was stipulated that the demurrer should be considered as a petition under Section 12 of the Act of March 3rd, 1899, and should be treated by the court as an application on the part of the government, pursuant to the terms of said section, for a mandatory injunction to compel the removal of the obstruction complained of, in accordance with the notice of the Secretary of War hereinabove referred to.

Briefly speaking, therefore, the question which the court is now called upon to determine, is the right and title of a riparian proprietor in a navigable waterway, as against the Government, to improvements placed pursuant to lawful authority, in the water way in front of his high land, between low water mark, and the line of navigability, and the effect upon such right or title, if any, of a subsequent change in the line of navigability, the result of which is to leave a part of such improvements outside of the re-established line.

WADDILL, *District Judge:*

Several incidental questions arise upon the pleadings, which will be considered before passing to the merits, namely, the rights of riparian owners under the laws of Virginia in lands bordering on streams and under the waters thereof to the line of navigability, the ownership of the submerged lands, the rights of the Federal govern-

ment respecting the waters in question, and the status of the riparian owner as respects land below low water mark.

The following may be conceded as the settled law in Virginia, regarding these matters, recognized and acquiesced in by the parties to this proceeding, save the fourth proposition, as to which they are not agreed:

First. That riparian owners have a fee simple interest to low water mark, in lands bordering on navigable streams.

Secondly. That the ownership of the lands in the bed of a navigable stream below low water mark, is vested in the Commonwealth, subject to the public easement or servitude in the Federal government in furtherance of the ends of commerce and navigation.

Thirdly. That the use of the waters in question is subject to the paramount power and authority of the Federal government thereto, in so far as it may determine to be necessary to further the ends of commerce and navigation.

28 Fourthly. Riparian owners have the right to erect wharves, or piers, or bulkheads, in water courses opposite their lands, provided navigation be not obstructed, nor the private rights of any person otherwise injured thereby, and that this right in Virginia, within the limitations mentioned, is not a mere license, but constitutes property in the owner.

A preliminary question is presented as to the power and authority of the Secretary of War to make the contemplated improvement, as well as of the lack of specific authority on his part to act, because of the failure of Congress to provide for the work by appropriate legislation.

The Act of Congress of 3rd March, 1899, 30 Stat. L., 1151, confers large powers upon the Secretary of War, respecting the rivers and harbors of the country, and the regulation of the navigation of the same, but whether in terms to do the specific work complained of, need not be decided, since by the Act of 4th March, 1911, 36 Stat. L., 1265-1275, provision is directly made for the improvement in question, namely, "for the purchase of land and widening of channel," and under this authority, the executive branch of the government has the right to designate the hand that it will use to carry out and perform the directions of Congress. The act making the appropriation is a sufficient declaration of the will of Congress that the improvement is desired for the legitimate purposes of commerce and navigation, and hence there can be no legal objection made, either to the making of the contemplated improvement, or the instrumentality chosen to carry out the same, provided the rights of the riparian owner, if any, be properly safeguarded and protected. Here, the act sufficiently fixes the location of the improvement, and the pleadings in this case admit that the complainant's lands are within the bounds of the same. South Carolina v. Georgia, 93 U. S., 4, 12; Gibson v. United States, 166 U. S., 269, 276; Scranton v. Wheeler, 179 U. S., 141, 157. In the latter case, Justice Harlan, speaking for the court on page 157, and quoting from Chief Justice Fuller in the Gibson case, said: "The legislative authority for these works consisted simply in an appropriation for their construction,

but this was an assertion of the right belonging to the government, to which riparian property was subject, and not of a right to appropirate private property, not burdened with such servitude, to public purposes.

This brings us to the crucial question to be determined, namely: the status of a riparian owner, who has built a pier or wharf,
29 or bulkhead, in front of his land, by and with the assent of the constituted authorities, and within the established harbor lines, upon the Federal government's concluding, in the interest of commerce and navigation, to widen the channel, necessitating the cutting off from his wharf or pier, some two hundred feet; that is to say, can the same be removed, destroyed or taken by the government, without just compensation therefor, as required by the Fifth Amendment of the Constitution.

The right of the government, in furtherance of the ends of commerce and navigation, to change harbor lines, to take the pier in question, or cut off and shorten the same, is conceded.

In Gilman v. Philadelphia, 3 Wall., 724, the court said: "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation interposed by the States, or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper against the occurrence of the evil and for the punishment of the offenders. For these purposes Congress possesses all the powers which existed in the States before the adoption of the National Constitution, and which have always existed in the Parliament of England." Gibbons v. Ogden, 9 Wheat., 1, 196, 197; Gilman v. Philadelphia, 3 Wall., 713, 724; South Carolina v. Georgia, 93 U. S., 4, 10; McCready v. Virginia, 94 U. S., 391; Scranton v. Wheeler (a decision of Mr. Justice Lurton, in the Circuit Court of Appeals for the 6th Circuit), 57 Fed., 803, 812, 815.

Whether, however, the government can exercise the authority thus claimed by and conceded to it, without making just compensation to those injuriously affected thereby, for damages sustained, under the facts and circumstances of this case, is vigorously contested and controverted by the riparian owner, the complainant here.

The government, on the one hand, claims that the contemplated work is with the view of widening a navigable stream, in the interest of commerce, in the performance of which it is not liable for damages arising to riparian owners, such damage being consequential and incidental to the necessary exercise of the power and
30 authority vested in it, and which is damnum absque injuria certainly so far as the government is concerned, and that it is contrary to the spirit of the Constitution and Laws of the United States, that the government should be hindered or burdened

in making such public improvements, by claims of riparian owners, whose property may be injuriously affected by what is being done.

The complainant, on the other hands, contends directly to the contrary, and insists, first, that the State holds the bed of a navigable stream merely as trustee for the use of the complainant and others; second, that its rights in the lands thus held as trustee by the State, are not a mere license or privilege, as held in some of the States, but, under the laws of Virginia, constitutes property, and that in the exercise of those rights, tangible property, constructed under authority and regulation of the trustee, is private property in the fullest sense, as stable and as fully protected as any other estate, and like all other property of the individual, can only be taken for public use upon payment of just compensation therefor; third, that once recognized and held as property, there is no exception made in the Constitution against its protection; fourth, that any physical invasion, whereby the owner is deprived of the possession or use of any portion of it, is a "taking" within the meaning of the Constitution; and, fifth, that in the exercise of its power and control over the waters in question, in the interest of commerce, the government of the United States possesses no higher or other power than the State held, or that the latter, acquired from the crown; each sovereign being successively trustee for all the people, and that the structures in question proposed to be removed by the government, namely, wharves, piers, bulkheads, &c., built out into the stream, with the assent of the trustee, are recognized everywhere as being not merely for the benefit of the owner, but as in aid of navigation, and forming an essential part thereof, without which commerce could not be carried on.

In the view taken by the court, a correct determination of the issues thus presented by the pleadings, will largely depend upon the character of the estate or interest held by the riparian owner under the laws of Virginia in the property involved in the pleadings, built out into navigable waters, pursuant to lawful authority, and the extent to which the government, in the interest of commerce and navigation, purposes to disturb the same, that is, whether what is proposed to be done amounts to a taking of property, or
31 merely incidentally affects it injuriously. The statute of Virginia, section 944*a* (31) is as follows: (31) Any person owning land upon a water course may erect a wharf on the same, or pier or bulkhead, in such water course opposite his land: Provided, navigation be not obstructed, nor the private rights of any person be otherwise injured thereby * * *." This act, and what may be termed the status of riparian owners, respecting waters on which their high lands border, has been the subject of frequent decisions by the Supreme Court of Appeals of Virginia, and the law may be said to be settled, that such owners are not merely licensees in respect to their rights in the lands and waters in question, but that their interests constitute a property right of which they cannot be lawfully deprived, without the payment of just compensation, if taken.

In Norfolk City v. Cooke, 27 Grat., 430, 435, the leading case in

Virginia on the subject, the Supreme Court of Appeals, especially citing the opinion of Mr. Justice Miller in Yates v. Milwaukee, and relying on that decision and the cases there referred to, says, after quoting the Virginia statute above mentioned: "This right of the riparian owner is not a mere license or privilege, but is property, property in the soil, up to the line of navigability, though covered by water; for a wharf, pier or bulkhead, can only be built on the soil. It is not a mere easement to pass over, or a privilege to use the surface, but property in the soil under the water, on which to fasten and build such structure; and for this purpose, and subject to the restriction that navigable waters shall not be obstructed, is as much property as the land above the margin of a navigable stream." To the same effect are the decisions of Virginia to the present time, the most recent case having been decided within the last two years (110 Va., 874), Groner v. Foster, 94 Va., 650; Taylor v. Commonwealth, 102 Va., 759, 771; Grinels v. Daniel, 110 Va., 874. In all of the Virginia decisions, the case of Yates v. Milwaukee, 10 Wall., 479, is referred to and relied on, and in the last two, the court quotes therefrom approvingly, the portion hereinafter set out.

The suggestion is made by counsel for the government, that a remark made by the court in the case of Taylor v. Commonwealth, supra, that the doctrine enunciated in the Cooke case, supra, was a broad statement of the law, which it was not called on to either criticise or approve, had the effect of modifying that decision; but such manifestly is not the case, as is clear from the court's language, and besides, of the Virginia cases named, the Taylor case was the
32 only one that did not involve the question here especially, it pertaining more particularly to the right of a riparian owner as against the State, to certain hidden property rights under water, namely, the right to bore an artesian well out in the stream, in a portion of the soil as to which complainant had theretofore made no assertion of riparian rights. Moreover, in the much more recent decision of Grinels v. Daniel, 110 Va., supra, more particularly in point here, the Cooke case was especially relied on, and no suggestion intimated as to any qualification thereof.

In the judgment of the court, the cases, in effect, agree, that where the interest involved is property, and the same is lawfully in the stream, and what is proposed is to take it, as distinguished from merely injuriously affecting it, that it can only be done upon making just compensation therefor. The contrariety of views that apparently prevail, grows out of the existence or non-existence of some one of the conditions indicated, and arises generally in cases injuriously affecting the high lands, or resulting in incidental injury or damage to the same, or to the riparian owner's rights appertaining thereto.

The case of Yates v. Milwaukee, 10 Wall., 497, 504, 505, supra, is more like the present in its essential features, than any Federal case to which the court has been referred. There, the owner of land fronting on the river in the City of Milwaukee, in the State of Wisconsin, had, pursuant to lawful authority, built over land covered by water of no use for the purposes of navigation, a wharf extending

to the navigable channel of the river. The City Council, under a State statute, enacted before the wharf was built, was authorized thereby to establish dock and wharf lines on the banks of the river, and to restrain and prevent encroachments upon and obstructions in the river, and to cause the river to be dredged; in pursuance of which the city, without evidence that the wharf was an obstruction to navigation, or in any sense a nuisance, passed an ordinance declaring the same to be such, and ordered it to be abated. Whereupon, Yates instituted proceedings to prevent the enforcement of the ordinance, or the removal of the wharf. The court held that a mere declaration of the city council that the wharf already built and owned by the plaintiff, was a nuisance, did not make it such, or subject to removal by the city authorities; the court saying: "But whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from
33 the front of his lot, the right to make a landing, wharf or pier for his own use, or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be. This proposition has been decided by this court in the cases of Dutton v. Strong, 1 Black., 25, and The Railroad Company v. Schurmier, 7 Wall., 272 * * *. "This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation."

In Shiveley v. Bowlby, 152 U. S., 1, 40, the Supreme Court of the United States indicated that much that was decided in the Yates case was obiter, still it was the unanimous opinion of the court, rendered in a case strikingly like the one under consideration here, while the Shiveley case was one of incidental or consequential damages, and not a taking of property.

The Yates case was the subject of further review by the Supreme Court, in the case of Scranton v. Wheeler, 179 U. S., 141, 158, which is strongly relied upon by the government, a much later case than that of Shiveley v. Bowlby, supra, and in which it is quite apparent to the court that upon a state of facts such as we have here, it would have received the sanction and full approval of the court. Mr. Justice Harlan, speaking for the court, at page 158, said: "The decision in Yates v. Milwaukee cannot be regarded as an adjudication upon the particular point involved in the present case. That, as we have seen, was a case in which the riparian owner, had in conformity with law erected a wharf in front of his upland in order to have access to navigable water. The City of Milwaukee attempted arbitrarily and caprisiously to destroy or remove the wharf that had lawfully come into existence and was not shown, in any appropriate mode, to have been an obstruction to navigation. It was a case in

which a municipal corporation intended the actual destruction of tangible property belonging to a riparian owner and lawfully used by him in reaching navigable water, and not, like this, a case of the exercise in a proper manner of an admitted governmental power resulting indirectly or incidentally in the loss of the citizen's right of access to navigation—a right never exercised by him in the
34 construction of a wharf before the improvement in question was made by the government."

Assuming that what the government proposed doing constitutes a taking of the complainant's property, the court can but believe that the foregoing decisions, and those of like import, control, and that the property can only be secured upon payment of just compensation therefor.

The Monongahela Navigation Company's case strongly sustains the view that if tangible property of the complainant placed in the navigable waters of a stream on which its property borders, pursuant to lawful authority, is to be taken for public purposes, it can only be done upon making just compensation. That case involved the taking of a dam and lock in the Monongahela River, placed there in the interest of commerce and navigation, and the Supreme Court held that inasmuch as the government's improvement involved the destruction of the lock and dam lawfully placed therein, with the consequent loss of business, including its franchises, it could only be done by paying proper compensation therefor. Monongehela Navigation Co. v. United States, 148 U. S., 312.

Two cases have been cited by counsel for the complainant, Weems Steamboat Co. v. People's Steamboat Co., 214 U. S., 354, and Scranton v. Wheeler, 57 Fed., 823, supra. These two decisions are of more than passing interest in that the first named is a very recent decision of the Supreme Court of the United States, on the right of riparian owners in wharf property in Virginia, and the other an opinion of Mr. Justice Lurton, speaking for the Circuit Court of Appeals for the 6th Circuit, considering the difference between cases in which the obstruction had been lawfully placed in the stream, and those in which it had not. "The rights of a riparian owner upon a navigable stream in this country are governed by the law of the State in which the stream is situated. These rights are subject to the paramount public right of navigation. The riparian proprietors have the right, among other things, to build wharves out so as to reach the navigable waters of the stream. * * *" (Weems Steamboat Co. v. People's Steamboat Co., 214 U. S., 354). "A distinction exists between those cases where, under authority of the State, a structure has been placed in a navigable stream, such as a bridge, or lock and dam, as an improvement to the nevigation of a stream wholly within its borders, and which is sought to be removed under the authority of subsequent Congressional legislation. In such case, the improvement, being by authority of law,
35 can only be taken for public uses upon just compensation. This is the doctrine of the case of Monongahela Navigation Co. v. United States, 148 U. S., 312. In that case it was held that not only the actual property of the owner in the structure,

but his franchise also, must be paid for. The plaintiff in the case before us has made no improvements for either public or private uses. No property of his has been invaded, none has been taken" (meaning, that no pier had been built where the government had erected its pier).

The case of United States v. Lynah, 188 U. S., 445, 458, 474, 479, while in some of its features similar, is not entirely like the one in hand. In many respects it is especially applicable, and strongly supports the complainant's view as to when and when not, and in what manner, the government can take a citizen's property.

The government cites many authorities in support of its views, among them Gibbons v. Ogden, 9 Wheat., 1, 196; Martin v. Waddell, 16 Pet., 410, 413; McCready v. Virginia, 94 U. S., 391; Willamette Iron Bridge Co. v. Hatch, 125 U. S., 1; Illinois Central v. Illinois, 146 U. S., 387; Shiveley v. Bowlby, 152 U. S., 1; Gibson v. United States, 166 U. S., 269; Scranton v. Wheeler, 179 U. S., 141; Chicago v. Illinois, 200 U. S., 561; Union Bridge Co. v. United States, 204 U. S., 364; Hannibal Bridge Co. v. United States, 221 U. S., 194, and Philadelphia Co. v. Stimson, 223 U. S., 605; Stockton, Attorney General, v. Baltimore, 32 Fed., 9; Taylor v. Commonwealth, 102 Va., 759; Cohn v. Boom Co., 47 Wis., 325; Black River Improvement Co. v. La Crosse Transp. Co., 54 Wis., 659; Keator Lumber Co. v. St. Croix Corporation, 72 Wis., 82; Sage v. New York, 154 N. Y., 761; and also an opinion of former Attorney General Griggs, 23 Op. Atty. Gen., 501. Undoubtedly the government has heretofore taken the same view now contended for, and it may be said that the Attodney General's opinion referred to, contains a very able and exhaustive exposition of that position; but whether the same has been accepted or can be maintained, is a very different proposition. In the view of the court, it will not be necessary to review the cases furnished by the government, further than to say that many of them are bridge cases, which involve different questions from the one under consideration. Others depend on an entirely different state of facts from this, and others still upon independent considerations from those properly applicable and controlling in this case. Special reference will only be made to three of the cases most
36 strongly relied on by the government, namely, Gibson v. United States, 166 U. S., 269, supra; Scranton v. Wheeler, 179 U. S., 141, supra, and Philadelphia Company v. Stimson, 223 U. S., 605. The first two of these cases have to do directly with the rights and powers of the government in making river and harbor improvements, in aid of commerce, to take property in which riparian owners are interested; but a careful examination of both of the cases will show that they neither control, nor as a matter of fact, materially affect the crucial point involved in this case.

In the Gibson case, the government in improving the Ohio River, at a point off Neville Island, some nine miles west of the City of Pittsburgh, constructed a dyke of considerable length in front of the plaintiff's, the riparian owner's property, in order to concentrate the water flow in the main channel of the river, which resulted in injury to plaintiff's land, a market garden, and landing for the ship-

ment of her products. Chief Justice Fuller, speaking for the court, said (p. 276): "In short, the damage resulting from the prosecution of this improvement of a navigable stream, for the public good, was not the result of taking of appellant's property, and was merely incidental to the exercise of a servitude to which the property had always been subjected."

In the Scranton case, the government erected a pier in St. Mary's River, Michigan, out into the river, across the front of the plaintiff's lands. The right of recovery arising from the damage to the riparian owner's property was denied, Mr. Justice Harlan, speaking for the court, saying at page 158 that it was "a case of the exercise in a proper manner of an admitted governmental power, resulting indirectly or incidentally in the loss of a citizen's right of access to navigation—a right never exercised by him in the construction of the wharf before the improvement in question was made by the government."

The case of Philadelphia Company v. Stimson will be found to contain a full and very recent discussion of the general subject, but nothing especially inimicable to the views herein enunciated, as a matter of fact, pages 624 to 636 in many respects strongly support the same. The case more particularly involved the rights of riparian owners, resulting from a change in their shore lines, caused by the flow of water, whether sudden or gradual, and the right of the government to change the harbor lines in consequence thereof, among other causes, but it only incidentally applies here, as viewed by the court.

In this circuit, the cases bearing particularly on the sub-
37 ject, are entirely in consonance with the view here expressed.

In the Hawkins Point Lighthouse case, 39 Fed., 77, 87, a controversy between the government and the riparian owner over the right to construct a lighthouse, Judge Morris, of the District Court of Maryland, in deciding in favor of the government, noted that in advance of the building of the lighthouse, nothing had been done by the riparian owner to assert his rights as such, to the land taken by the government.

In the case of Richardson v. United States, 100 Fed., 714, a decision of Judge Simonton in the United States Circuit Court for the Eastern District of Virginia, it was decided that the improvement made by the government out of which the litigation grew, resulted in incidental damage and injury to the petitioner's property, and hence that no recovery could be had.

It is not believed that in any of the cases involving damages arising from the taking of property of the riparian owner, compensation has been refused except where they were either of merely incidental character, or where there had been no assertion of such right, or that the exercise of the same had been attempted without previous and proper authority, to extend piers or wharves out into and occupy navigable waters.

Is it proposed to take complainant's property here? On the correct answer to this enquiry largely depends the question at issue. If what they have is property, and the same is to be taken, then, con-

fessedly, it can only be done upon making due payment therefor to the owner. Const. Art. V.: "nor shall private property be taken for public use, without just compensation." The counsel for the government, in the very able and learned argument made on its behalf, was driven to the alternative of maintaining that what was proposed was the destruction of, and not the taking of the pier in question. This will not, in the court's judgment, answer, certainly in a case involving the right and title of a riparian owner to tangible property built out into the navigable waters, on which his lands borders, by lawful authority. To all intents and purposes, the destruction and taking of the same, one is tantamount to the ther. In either event, the complainants lost what they have and the government gets what it desirs. Whatever may be the power of the government to destroy the property of a stranger, or a trespasser, or even a licensee, in furtherance of the ends of commerce, no such right and authority exists in dealing with the rights of those lawfully using and occupying the waters, such as a riparian owner,

38 The language of Mr. Justice Brewer in United States v. Lynah, 188 U. S., 464, after referring to Great Falls Manuf'g Co. v. Attorney General, 124 U. S., 381, and several other cases, in which the government had arbitrarily taken private property before condemning or otherwise lawfully acquiring the same, seems appropriate here. "The rule deducible from these cases is that when the government appropriates property which it does not claim as its own, it does so under an implied contract that it will pay the value of the property it so appropriates. It is earnestly contended in argument that the government had a right to appropriate this property. This may be conceded, but there is a vast difference between a proprietary and a governmental right. When the government owns property, or claims to own it, it deals with it as owner and by virtue of its ownership, and if an officer of the government takes possession of property under the claim that it belongs to the government (when in fact it does not) that may well be considered a tortious act on his part, for there can be no implication of an intent on the part of the government to pay for that which it claims to own. Very different from this proprietary right of the government in respect to property which it owns is its governmental right to appropriate the property of individuals. All private property is held subject to the necessities of government. The right of eminent domain underlies all such rights of property. The government may take personal or real property whenever its necessities or the exigencies of the occasion demand. So the contention that the government had a paramount right to appropriate this property may be conceded, but the Constitution in the Fifth Amendment guarantees that when this governmental right of appropriation—this asserted paramount right—is exercised it shall be attended by compensation."

So far as the owner is concerned, the effect is precisely the same, whether property be appropriated for the government's uses, or by force and violence destroyed, in order that it may encompass its ends and accomplish its purposes. As to just what constitutes a taking, the same learned justice quotes from the opinion of Mr. Justice

Miller, in Pumpelly v. Green Bay Company, 13 Wall., 166, as follows:

"The argument of the defendant is that there is no taking of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation.

39 "It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

What the pleadings admit is to be done in the case, as viewed by the court, clearly constitutes the taking of complainant's property, for which they are entitled to be remunerated.

Reference may be had to the following authorities as supporting generally the views herein expressed: Shively v. Bowlby, 152 U. S., 40; Stockton v. Baltimore, &c., R. R. Co., 32 Fed., 19; Sullivan Timber Co. v. City of Mobile, 110 Fed., 190, 194; Commonwealth v. Alger, 7 Cush., 83; Horner v. Pleasants, 7 Atl., 692; Lewis v. City of Portland, 35 Pac., 256; 1 Farnham on Waters and Water Rights, 50, 136, 510, 511, 551, 552, 569; 1 Lewis on Eminent Domain, sec. 76 (*b*), 7883.

In reaching the conclusion here, sight has not been lost of the fact of the importance of the case to the government, not only because of the amount involved in this and similar cases, but because of possible delays and inconveniences that may result therefrom, in making contemplated improvements. But nevertheless, the court can but believe that when, in the interest of commerce and furtherance of its ends, property of the character involved in this case, itself being an instrument of commerce, lawfully placed by a riparian owner in navigable waters has to be taken, that loss arising thereby should not fall upon an innocent riparian owner exclusively, but upon the government, and thus be borne by the public generally.

It follows from what has been said that the mandatory in-

40 junction asked for by the government, to remove the pier and its appurtenances, should be denied, and it will be so ordered.

Order Substituting New Secretary and Assistant Secretary of War as Defendants.

Entered June 24th, 1913.

It being suggested to the court by the United States District Attorney that Henry L. Stimson, Secretary of War, and Robert Shaw Oliver, Assistant Secretary of War, have resigned, and no longer occupy the respective offices aforesaid. and that Lindley M. Garrison has been duly appointed Secretary of War and Henry S. Breckenridge has been duly appointed Assistant Secretary of War, and occupy the said offices respectively, it is ordered by the court that the said Lindley M. Garrison, Secretary of War, and the said Henry S. Breckenridge, Assistant Secretary of War, be, and they hereby are, substituted as defendants in the place and stead of the said Henry L. Stimson and Robert Shaw Oliver, and that this suit continue in the names of the said Lindley M. Garrison, Secretary of War, and Henry S. Breckenridge, Assistant Secretary of War.

EDMUND WADDILL, JR.,
United States District Judge.

Norfolk, Va., June 24th, 1913.

Order Overruling Demurrer.

Entered July 3rd, 1913.

This cause came on this day to be again heard upon the bill of complaint and exhibits thereto attached, heretofore filed, the preliminary restraining order entered herein on the 6th day of July, 1912, and the demurrer of the defendants, Henry L. Stimson, Secretary of War, and Robert Shaw Oliver, Assistant Secretary of War, to the said bill of complaint, said demurrer treated by consent of parties by counsel as an application on the part of the government for a mandatory injunction under Section 12 of the Act of March 3, 1899, to remove the obstruction complained of, and was argued by counsel.

Upon consideration whereof, the court, for reasons stated
41 in writing and filed with the record, doth deny the application for mandatory injunction prayed for; and the United States not insisting upon its objection to the jurisdiction of the court, the court doth now overrule the demurrer to the complainant's bill, and doth continue in effect the said temporary restraining order until the further order of the court herein. And the defendants, with the consent of complainant, are given twenty days from the date of this decree to file their answer to complainant's bill.

EDMUND WADDILL, JR.,
United States District Judge.

Norfolk, Va., July 3rd, 1913.

Answer of Defendants.

Filed July 14th, 1913.

To the Honorable Edmund Waddill, Jr., Judge of the said Court:

The answer of Lindley M. Garrison, Secretary of War of t United States, and Henry S. Breckenridge, Assistant Secretary War of the United States, to the bill of complaint of the above nam complainant:

These defendants, for answer to the said bill of complaint, say follows:

They admit the allegations contained in paragraphs 1 and 2.

The statement contained in paragraph 3 to the effect that a reso tion of the Board of Harbor Commissioners granting it permissi was obtained in the year 1873 for the construction of wharf is deni by the defendants because they are advised and informed that the was no legally established Board of Harbor Commissioners in sa year. They therefore deny that there was any lawful authori obtained for the construction of the wharf and fill constructed in t year 1873.

They admit that a resolution was adopted in the year 1883, stated in the bill, and that the language of the same, as copied in the bill, is correct, but they deny that the said resolution authorize the construction of anything more than a pier or wharf, an
42 they therefore say that the construction of the pound or bas was without any lawful authority.

Defendants deny that the widening of the channel at the point question was not for the purpose of protecting and facilitating co merce, or that it was for the private purposes of the government; the contrary, they say that the same was necessary for the prop navigation of the river.

Defendants call for proof as to the statement of the bill that co plainant's wharf extends two hundred feet outside the re-establish line, but say that even if this be true, the maintenance of the sa outside such re-established line is in violation of the lawful orders the Secretary of War.

Defendants admit that the wharf, pier and pound were all inla of the formerly established Port Warden's Line or Pierhead Li but defendants also say that the pound or basin, for the construct of which, as hereinbefore shown, no lawful authority, State or Fe eral, was obtained, is now outside such re-established line, and creat in itself an obstruction and a menace to navigation.

For the reasons just hereinbefore stated, defendants deny all of t allegations contained in the first section of paragraph 6. Defendan however, admit that certain correspondence was had between t Hon. Beekman Winthrop, Acting Secretary of War, and complai ant, but deny that anything in said correspondence committed t United States government to a recognition of the right of co plainant to establish a wharf or pound outside the re-establish Port Warden's Line. Defendants make the same answer in rega

to the inference attempted to be drawn by complainant in relation to condemnation proceedings.

Defendants admit that the notice marked "Exhibit No. 2" and filed with the bill is a correct copy of the notice served upon complainant by order of the Secretary of War.

Defendants say that the first line established by the United States in the Southern Branch of the Elizabeth River outside of the property in question was established in 1889 pursuant to the Act of Congress of 1889; 30 S. L., 1153; that prior to that time there was no lawfully established government line in said river; that the Pierhead Line established pursuant to the Act above referred to was identical with the previously established State Port Warden's Line, and that the same as then established left a sufficient width of channel for the then needs of commerce and navigation, but that subsequently thereto, to-wit, on June 12th, 1911, the said Pierhead Line

43 was changed and re-established, but only after notice to all parties in interest, and after a hearing before the representative of the Secretary of War in charge of the harbor improvements of Norfolk and vicinity; that such line as re-established is the present Pier-head Line, out to which wharves and piers may be constructed, subject to removal when and if they become a menace to navigation, but beyond which they may not at any time or under any circumstances extend, and that the said line when so established is subject at all times and under all circumstances to the control of Congress, acting through the Secretary of War, in the maintenance of the channel in the interest of commerce and navigation; 30 S. L., 1153.

Defendants deny that the effect of changing the Harbor Line or Pier-head Line will deny complainant access to deep water, but, on the contrary, defendants say that complainant has the same access to deep water it has always had.

Defendants therefore respectfully pray that this Honorable Court will, after hearing proof, proceed to order the demolition of such portions of the wharf and pound as may be found to be outside the re-established Pier-head Line; that the order heretofore entered by the court, restraining the Secretary of War and the Assistant Secretary of War from proceeding with the improvements provided for by the Act of Congress adopted the 8th day of March, 1911, 36 Statutes at Large, pages 1265-1275, may be dissolved; that the complainant's bill may be dismissed; and that these defendants may have such other and further relief as is proper, and that these defendants may recover their costs in this behalf expended.

And these defendants will ever pray.

LINDLEY M. GARRISON,
Secty. of War.
HENRY S. BRECKINRIDGE,
Asst. Secty. of War.
By D. LAWRENCE GROVER,
U. S. Atty.

UNITED STATES OF AMERICA,
Eastern District of Virginia, To wit:

E. Eveleth Winslow, being duly sworn, deposes and says that he is in charge of the improvements in the harbor at Norfolk, Virginia, under the authority and direction of the Secretary of War and the Assistant Secretary of War of the United States, and for them
14 and in their stead, makes oath that the statements contained in the above and foregoing answer are true to the best of his knowledge, information and belief.

E. EVELETH WINSLOW.

Subscribed and sworn to before me this 14th day of July, A. D. 1913.

D. ARTHUR KELSEY,
Deputy Clerk, U. S. District Court.

Agreed Statement of Facts.

Filed in Open Court October 29th, 1913. D. A. Kelsey, D. Clk.

In order to avoid the necessity of taking formal depositions as far as it can be done, it is agreed between counsel for complainant and defendant in the suit of Greenleaf Johnson Lumber Company against the United States, that the following facts shall be considered as proven in this case:

1st. That the statute providing for the appointment of a Board of Harbor Commissioners was first enacted in 1875, but that prior to said date Harbor Masters had been regularly appointed for the harbor of Norfolk and Portsmouth and Norfolk County, with power and authority as prescribed in the statute providing for such officers, to which for its terms and conditions reference may be made at any state of these proceedings by either party to this cause. That prior to 1873 the wharf and a portion of the log pond was established and used, and that in 1883 or 1884 the same were enlarged and improved to their present dimensions. It is further admitted that in the construction and repair of said wharf the blue print hereto attached, marked A, shows the correct location of the complainant's wharf, log pond, and other improvements with respect to the present port warden's line as now established and shows the distance said property extends beyond said line. That at the point where the word "wharf" is written to the right of the map is a regularly constructed wharf made of piles filled in with dirt, and decked with lumber. That the next projection to the left of the wharf on which appears the word "Fill" is a fill composed of earth, slabs and shells, surrounded
45 by piles. That the next projection to the left showing a circle marked "Green" is a fill of earth and shells, surrounded by piles. That the log pond was and is constructed on the west and south by two lines of piles distant about forty feet apart, filled in with earth, slabs and shells. That the northern end of said log pond was and is constructed in the same way in part and in part with the

fill marked "Green" on the map. That at the north and south side of the said log pond there are entrances left for the taking in and carrying out of logs. That this log pond was originally dredged to a depth sufficient to float the logs to be stored therein and the mud taken from the center was placed in between the parallel line of piles above described. That the complainant and its predecessors in the conduct of its business purchased logs from various points in Virginia and other States and the same with their own logs from North Carolina were floated to their place of business upon the Elizabeth River and into said pond and thence taken ashore and manufactured into lumber. That the exact date of the establishment of a harbor line at this place by the authorities of the State of Virginia is not definitely known, but was approximately in the year 1876 and remained as so established until the year 1890 when the same was adopted by the Secretary of War as the Harbor line established by the Federal Government and the same so remained until the recent establishment of the present Harbor lines June 12th, 1911, which was so established by the Secretary of War after notice, &c., and that until said new line was established, no part of the complainant's property was outside of the same.

That on the 22nd day of July, 1911, the Navy Department wrote to the complainant stating that that department intended making certain improvements in the Navy Yard and requesting the complainant to fix a price at which it would sell so much of its property or wharf and log pond as lay without the present port warden's line. The complainant answering said letter stated that the matter would be laid before its Board of Directors on July 26th, 1911, and thereafter the attached correspondence was had between the Navy Department and the complainant. That while the above paragraph is admitted as a fact, it is nevertheless objected to by the defendants for the reason that the same is not relevant or material to the decision of this case and it is claimed by said defendants, Secretary of War and Assistant Secretary of War, that this admission does not bind them.

46 That the water now immediately in front of complainant's property is navigable, but if the present structures are removed to the present harbor line as demanded by the government the complainants will be cut off from navigable water unless the river is dredged where the structures now are. That an Act of Congress, approved March 4th, 1911, entitled "An Act making Appropriations for the Naval Service for the year ending June 30th, 1912, and for other purposes" (36 Stat. at Large, 1265, 1275), has been passed, in which Act an appropriation has been made for dredging the bottom of the river at the point in controversy, pursuant to which the Government proposes to widen the channel to the new port warden's line.

It is further admitted that the fee simple title to the high land to low water mark adjacent to the port warden's line in question, is in the Greenleaf Johnson Lumber Company, the complainants in this suit.

The re-established or new harbor line runs along the front of

complainant's wharf at the northern end of the property, cutting off approximately two feet of the same.

STARKE, VENABLE & STARKE,
Attys. for Comp't.
JEFFRIES, WOLCOTT, WOLCOTT & LANKFORD,
Attys. for Complt.
D. LAWRENCE GRONER,
U. S. Atty.

Exhibits with Statement of Facts.

Filed October 29, 1913.

August 29th, 1911.

Hon. Beekman Winthrop, Acting Secretary of the Navy, Washington, D. C.

DEAR SIR: Replying to yours of the 18th inst., our Directors are gentlemen of affairs and all seem to think rather more of the worth of property in the vicinity of Norfolk than you do. If you care to make us a counter offer I will be pleased to call a meeting
47 of our Directors and present it to them, but I hardly think they care to bid against themselves as you suggest. As for the property in question, we need it in the conduct of our business, are using it, and as for the looks of it we were rebuilding that section of our wharf and only stopped when approached as to its purchase.

As we wrote Col. Patrick, we considered that changing the harbor lines at this point was entirely for the benefit of the Navy Department and would so decrease the depth of most of our property as to make it unavailable for use for many purposes if we should ever decide to sell it.

Awaiting your kind reply, we are,

Respectfully yours,
j/d. GREENLEAF-JOHNSON LUMBER CO.

11083-26.

Navy Department. Mn.

WASHINGTON, August 18, 1911.

GENTLEMEN: The receipt is acknowledged of your letter of the 16th instant relative to the price placed by you on the old sawdust and shellfill along the water front of your property on the Southern Branch of the Elizabeth River, which fill the Department desires to remove in the course of the improvements to be made in the channel of the river at this place.

The price fixed by you on this particular property, $50,000 is exorbitant. So far as the Department is advised this fill is in a very dilapidated condition, has little or no intrinsic value, and is not now in a position to be placed in a serviceable condition.

The only purpose of the Department in acquiring this fill, is to

have it removed for the purpose of widening and deepening the channel at this place. No vested rights in any of your real property are desired by the Department, nor will any of your riparian rights in this locality be restricted in any manner. In fact, it would seem that, upon the completion of the contemplated improvements, the value of your property will be materially enhanced.

48 In view of the foregoing and in order to avoid the necessity of recourse to legal proceedings, the Department would be pleased to have you reconsider the price stated in your letter, and to place a price on this fill that may be considered by the Government.

The Department, in case you so desire, will detail a civil engineer to consult with the officials of your company for the purpose of endeavoring to fix a fair and reasonable valuation on this fill. An early answer to this letter is requested.

Respectfully yours,

BEEKMAN WINTHROP,
Acting Secretary.

Greenleaf-Johnson Lumber Company, Norfolk, Va.

August 16th, 1911.

Beekman Winthrop, Esq., Acting Secretary, Navy Department, Washington, D. C.

DEAR SIR: Replying to your communication of the 9th inst., No. 11083-25, I would say that I have consulted with my Board of Directors, and they think the sum of $50,000.00, will be a fair valuation for the amount of the property belonging to our company that you desire to take.

Very respectfully,

GREENLEAF JOHNSON LUMBER CO.,
Per —— ——.

DEAR SIR: Replying to your communication of the 9th instant, No. 11083-25, I would say that I have consulted with my Board of Directors, and they think the sum of $50,000.00 will be a fair valuation for the amount of the property belonging to our company that you desire to take.

Very respectfully,

49 11082-25. Navy Department. Mn.

WASHINGTON, August 9, 1911.

GENTLEMEN: Referring to your letter of the 5th instant relative to the improvements in the Southern Branch of the Elizabeth River along the water front of your property, you are advised that the Department is prepared to pay a fair and reasonable price for so much of the old saw-dust and shell fill as lies between the present harbor lines and the lines in existence prior to June 13, 1911.

In fixing the value of this fill the company of course understands

that the improvements to be made by the Government in this channel will in no manner interfere with the present riparian rights of their property. In fact, it would appear that the deepening of this channel will add materially to the value of the water front property.

In order that the Government may proceed with the improvements without unnecessary delay, the Department would be pleased to — informed as to the value you place on this fill.

Respectfully yours,

BEEKMAN WINTHROP,
Acting Secretary.

Greenleaf-Johnson Lumber Company, Norfolk, Va.

August 5th, '11.

Beekman Winthrop, Esq., Acting Secretary, Navy Department, Washington, D. C.

DEAR SIR: Your letter of the 4th inst., received and noted.

In reply beg to advise that the letter referred to has been answered and we herewith enclose copy of the same.

Very truly yours,

Enc. I.

50 11083-19 Navy Department. Mn.

WASHINGTON, August 4, 1911.

GENTLEMEN: Referring to the Department's letter of the 22d ultimo relative to the improvements in the Southern Branch of the Elizabeth River along the water front of your property, you are advised that the Department would be pleased to be informed as to the action taken at the meeting of the Board of Directors of your company, held July 26th, in respect to the question of the removal of the saw-dust and shell fill extending beyond the harbor lines as established June 13, 1911.

Respectfully yours,

BEEKMAN WINTHROP,
Acting Secretary.

Greenleaf-Johnson Lumber Company, Norfolk, Va.

25966. War Department.

WASHINGTON, July 9, 1912.

DEAR SIR: Referring to War Department notice requiring the Greenleaf Johnson Lumber Company to remove a portion of the wharf opposite the Norfolk Navy Yard, to which the company takes exception, until proper compensation has been made for the property, and replying to your letter of 3d instant, inclosing copies of the bill of complaint, order of the court and subpœna in chancery, and asking that the same be accepted by the Secretary of War and

the Assistant Secretary of War, I beg to inform you that as War Department action was based upon the quest of the Navy Department, your letter and accompanying papers have this day been referred to the Honorable the Secretary of the Navy, for his consideration and such action as may be deemed appropriate, the War Department offering to lend such co-operation in the premises as may be necessary.

Very respectfully,

ROBERT SHAW OLIVER,
Assistant Secretary of War.

51

John L. Jeffries Esq.,
Attorney at Law,
Seaboard Bank Building,
Norfolk, Va.

July 3rd, 1912.

Hon. Robert Shaw Oliver, Assistant Secretary of War, Washington, D. C.

DEAR SIR: On the 3rd day of May, 1912, the enclosed notice was served upon Greenleaf Johnston Lumber Company, of Norfolk County, looking to the removal of its wharf opposite the Norfolk Navy Yard. Before taking any steps with reference to the same Mr. W. H. Venable and I accompanied by Senator Thomas S. Martin, called at the War Department to see if any adjustment of the matter could be reached without litigation, and to ascertain the status of the matter from the Government standpoint. Neither the Secretary of War nor yourself was in town, but we saw the Chief of Engineers, who was kind enough to get in touch with the Navy Department and after going over the correspondence between the two Departments, we were told that the War Department had taken this step at the request of the Secretary of the Navy in order to have determined the question as to whether or not the property could be removed by the War Department in the interest of navigation and that the notice was given as the initiatory step in a proceeding to have that question tested, it being expected that we would ask an injunction and let it be brought up in that way. In fact, the gentleman who talked with us said that the only thing we could do would be to ask for an injunction as soon as the time arrived for action on our part.

We have accordingly prepared a bill of injunction in which the questions involved from our standpoint are raised and have presented it to Hon. Edmund Waddill, Jr., the Judge of the District Court of this District, who has endorsed thereon an order citing the defendants to appear at his court room in Norfolk, Virginia, on July 16th, to show cause why the injunction should not be granted, saying to us that he had no doubt that this order to
52 show cause would be sufficient at this time and that pending the determination of that question he did not suppose any further steps would be taken towards the physical removal of the wharf.

Inasmuch as the condemnation proceedings with respect to this

property which were finally dismissed, had been represented by Hon. L. L. Lewis, District Attorney, I called him up to-day to ascertain whether he would accept service and represent the Government without the necessity of sending the subpœna and papers to Washington. He stated that he did not understand that he had any further connection with the case after the dismissal of the condemnation proceedings and suggested that I send you the writ and copy of the bill as ordered by the court with the request that you accept service of both, and added that if it was referred to him by you, or the Department of Justice, he would be glad to look after the Government's interest, but that until it came in that way he did not feel authorized to act in the matter.

In view of what transpired, and the suggestions which were made when I was in Washington, I am taking the liberty of enclosing you copies of the bill with the order of the court endorsed thereon, and the subpœna in chancery issued by the clerk, with the request that you have service accepted by the Secretary of War and yourself of this order and subpœna, and return the same to the Clerk of the United States District Court at Norfolk, Virginia.

In this way the questions involved can be speedily presented and determined.

Very truly yours,

——— ———.

(Here follows map marked p. 52*a*.)

MAPS

TOO

LARGE

FOR

FILMING

Evidence in Narrative Form.

Filed December 11th, 1913.

Oral Evidence.

In Open Court (October 29th, 1913).

W. W. HARRIS, a witness for the complainant, after being duly sworn, testified that he was assistant superintendent of complainant from 1880 to 1890; asked if during that time he had occasion to use for the purpose of a storage wharf the 40-foot parallels or solid fill surrounding the log pond shown on the map referred
53 to in the statement of facts, he replied that he had used it as a storage for lumber; that the company had a bogey track on the wharf and piled lumber on it, and that he received and shipped lumber from it.

On cross-examination, the witness stated that at the time of his employment in 1880, the log pond occupied substantially the same location as now; that the track he called a "bogey track" was built after the wharf was built to store lumber on; that it was first used to carry down slab wood to fill in between the rows of piles, and that after this was filled in it was used as a lumber wharf; that there was a shed at the northern end of the log pond and a coal bin at the southern end. The witness also stated that there had been some years prior to 1911, he could not remember the exact time, a shed on the part of the property shown on the plat and marked thereon "Green."

O. R. WAGNER, another witness for the complainant, after being duly sworn, testified that he had been lumber inspector for the complainant for a little over eleven years, and that during the last year he had been superintendent of the shipping department. He identified the plat filed with the agreed statement of facts, and testified that the northern end of the log pond was used for receiving and shipping lumber, and that the western side was also used for receiving and shipping lumber; that a tramroad ran down the western side, which is the main water front, and which was used for receiving and shipping lumber, and that lumber was stored on both sides of the track; that this projection from the shore was about 40 feet wide, with the track in the middle and room for the storage of lumber on each side; that subsequently and after the property had been leased to the Camp Manufacturing Company by the complainant, the former company used the property in question and had the same connected by the Belt Line Railroad; that the railroad connection from the shore ran out on the 40-foot projection about 125 feet; that he had loaded vessels on the western side of the log pond while they were tied up to the piles constituting the outer side of the log pond projection, and that these piles were held together by cap logs placed on top of them; that the

wharf, with a shed for the storage of lumber is located at the northern end of the property, as shown on the plat with the agreed statement of facts; that there is no railroad running down on the
54 log pond projection at the present time.

S. L. SPRATLEY, another witness for the complainant, after being duly sworn, testified that he is at present the superintendent of complainant, and that as such he helped to construct the log pond; that at the present time the 40-foot projection around the log pond is being used for the storage of piles; that the same had been used by the Camp Manufacturing Company at the time of its lease of this property for shipping pine lumber from. The witness, over the objection and exception of the defendants, testified that it had been the intention of the company to repair the wharf, but that the government proceedings caused this to be abandoned. The witness also testified that a railroad formerly ran down on this projection and that there had been a shed on the property marked on the plat "Green."

On cross-examination, the witness testified that the sides of the log pond hereinbefore spoken of as the "projection" were pretty well worn out and dilapidated, and are not safe to be used at present, and that the piles which he stated are now stored there had been in their present position some three years; that the complainant had leased its mill to the Camps several years ago, and that the Camps had used the property at that time; that subsequently Capt. Hoagland, a shipper of piles, had used the log pond, and that the same had never been abandoned; that the complainant was still carrying on a large milling operation on this same property of which the log pond is a part, but that the mill is not now located on the exact spot as formerly, and that they are not now using the basin of the log pond, and have not been for some time, but that they are using the enclosure of the log pond for the storage of piles; that the number of piles stored on the log pond at this time is something like 40 or 50, which have been there some three years.

J. F. BENSON, another witness for the complainant, after being duly sworn, testified that he was a civil engineer, and that he had taken measurements and calculated distances from the opposite sides of the river of the old and new harbor lines as they were established. He stated that the new harbor line deflects from the old on the station at the Torpedo Slip at St. Helena, opposite
55 the Navy Yard; that the width of the river at that point is 608.4 feet; that from that point the line deflects inshore, and that the widest point of such deflection is opposite the high land of the complainant, at which point the river is, by reason of the establishment of the new harbor lines, 866 feet as against the former width of 600 feet; that the point in question is immediately opposite the Navy Yard; that from the point where the river is widened by the new line at the point where the new line strikes the old line again, the river is 720 feet; that from St. Helena down the river, toward Norfolk, the river maintains an average width of

Exhibit 1.

Feb. 9, 1911.

U. S. Navy Yard Norfolk, Va.

Water Front of Greenleaf-Johnson property

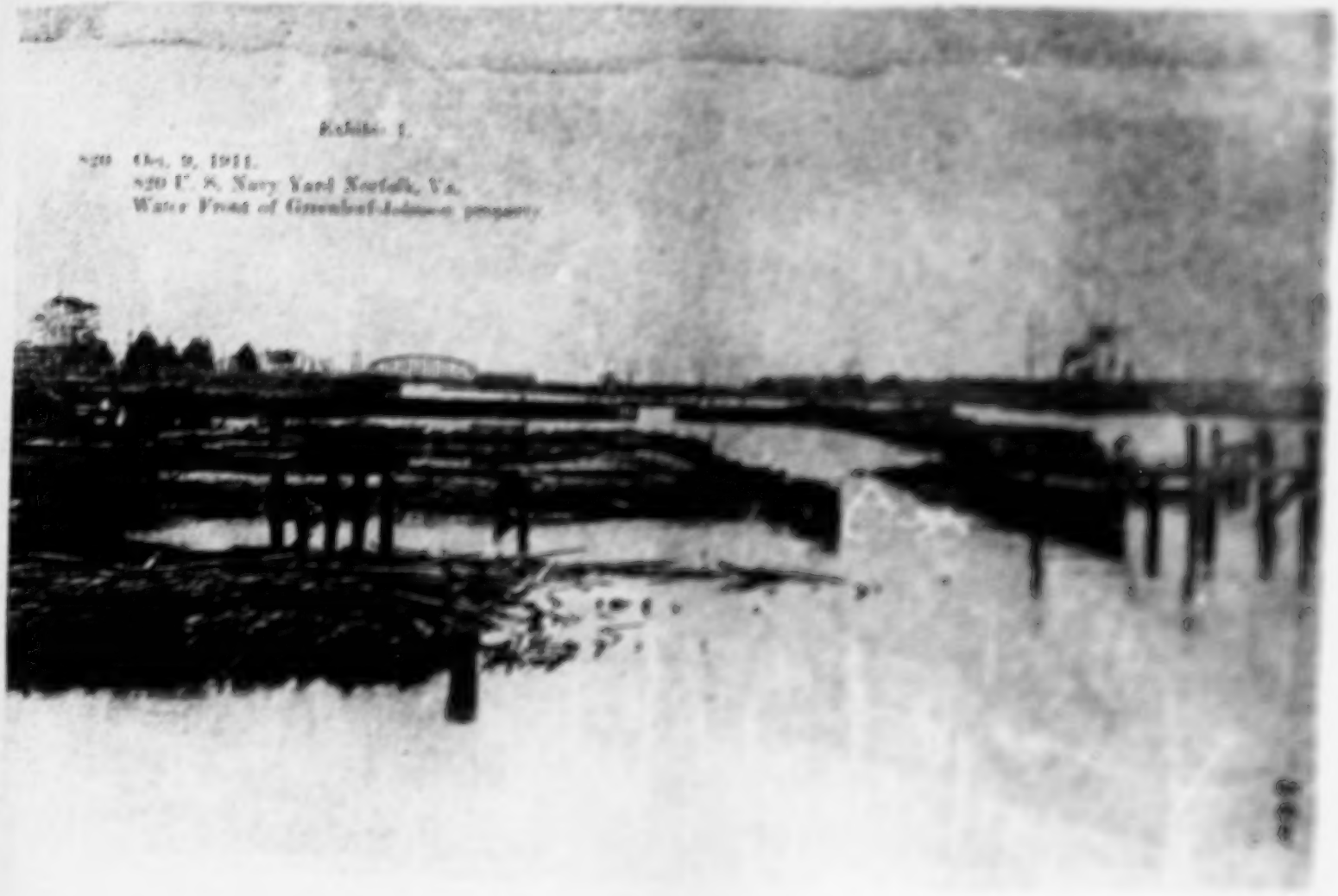
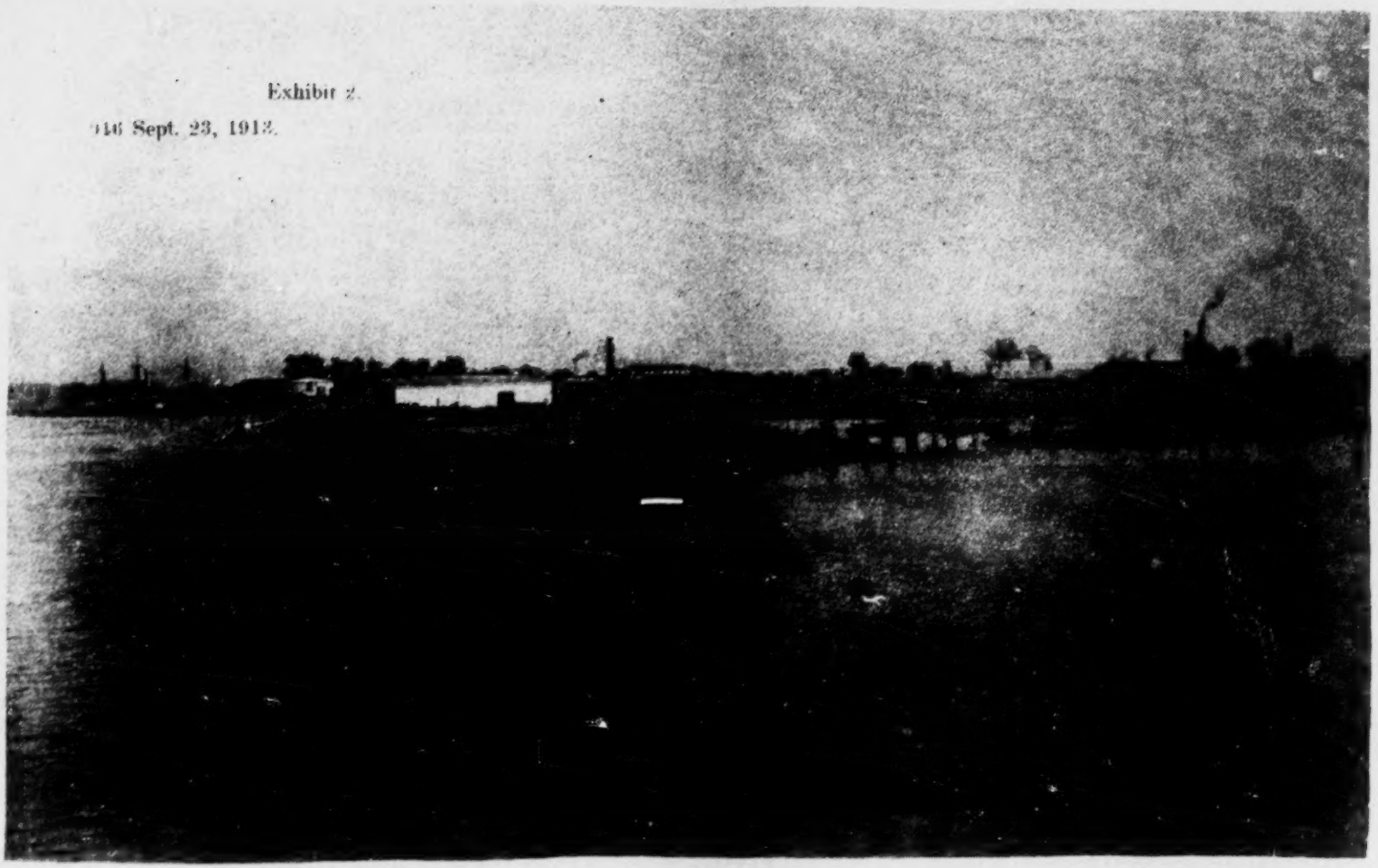
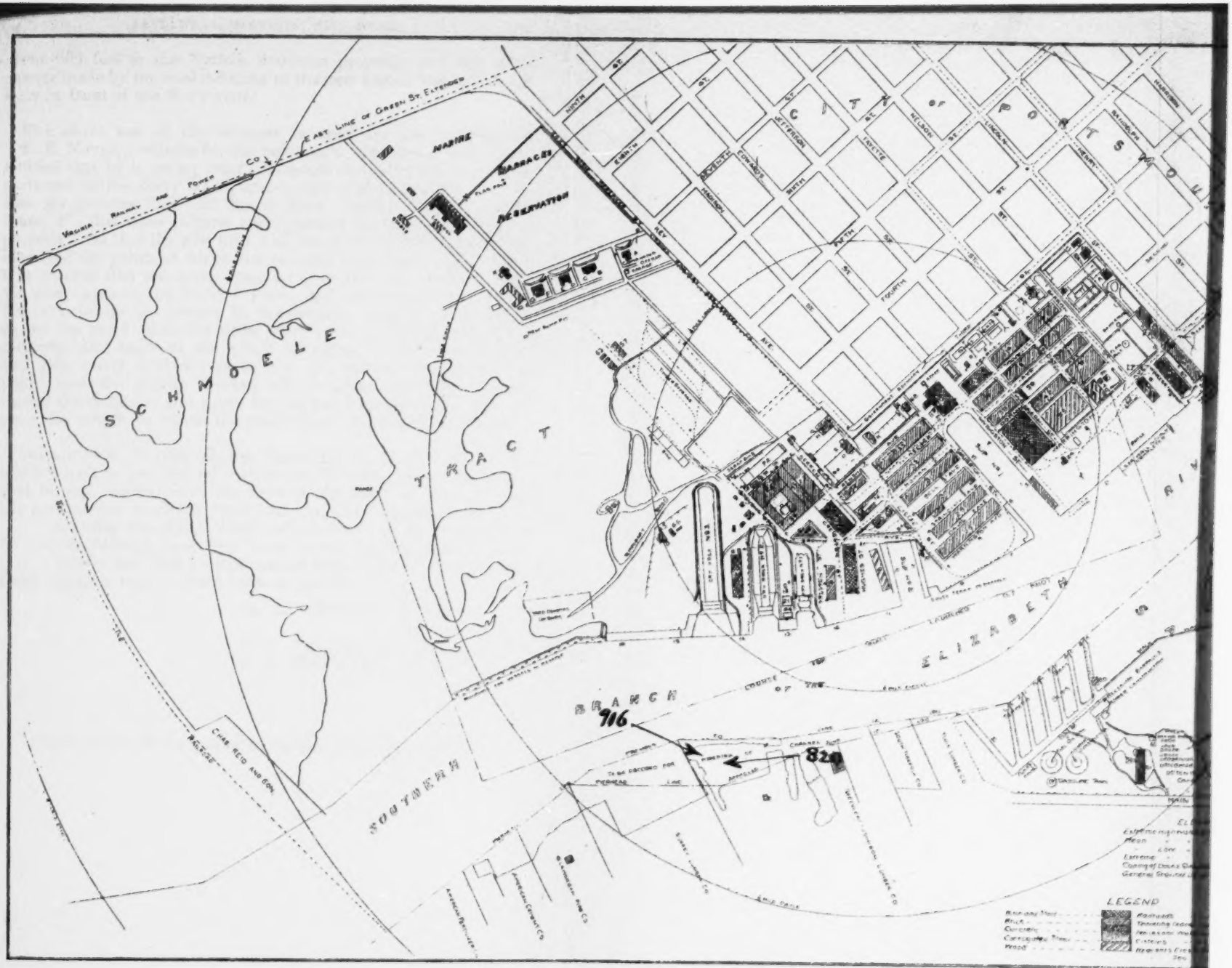
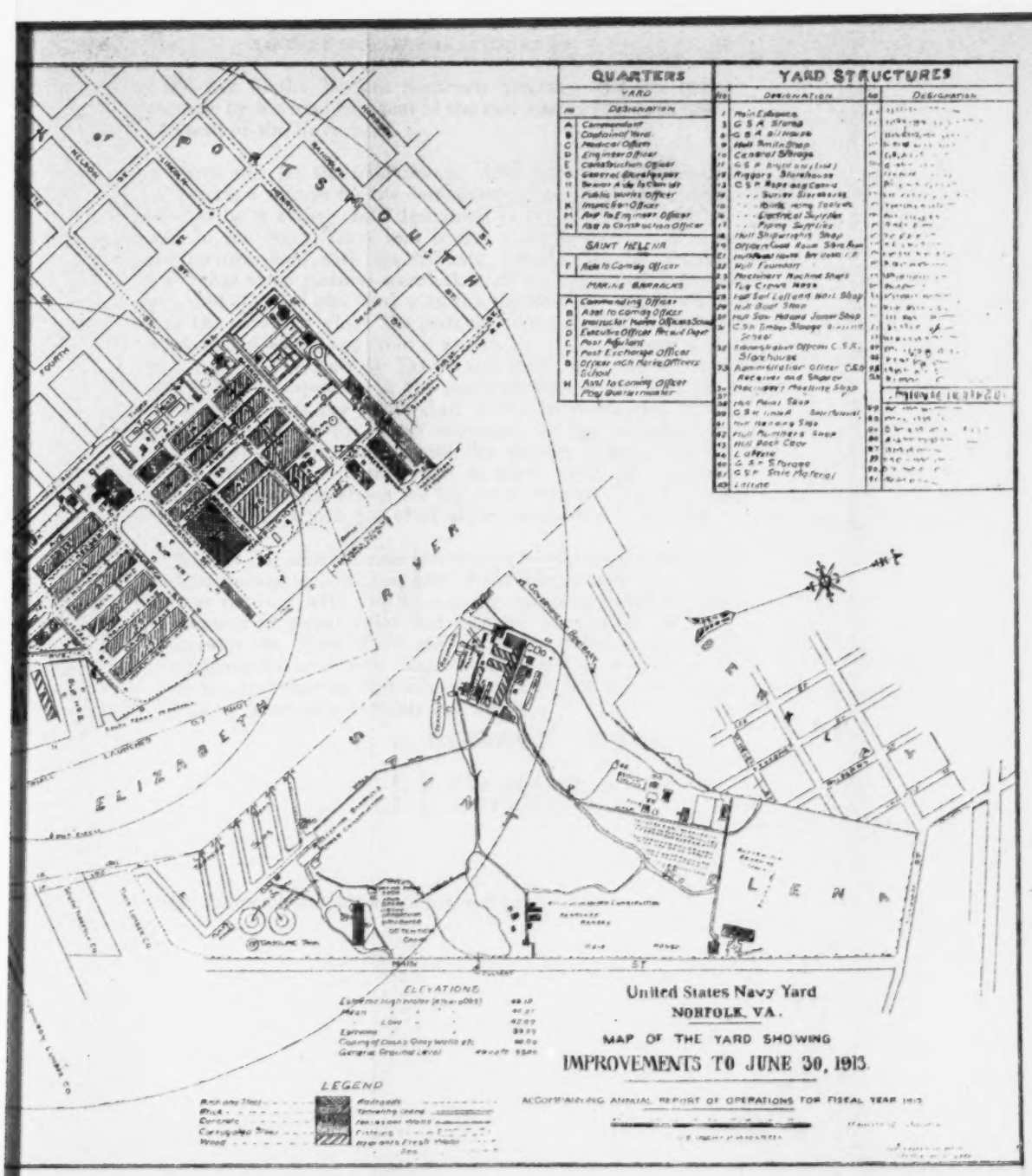


Exhibit 2.

946 Sept. 23, 1913.




EAST LINE OF GREEN ST. EXTENDED
MARINE
BARRACKS
RESERVATION
CITY OF PORTSMOUTH
SCHMOELE
TRACT
SOUTHERN
BRANCH
ELIZABETH
916
829
LEGEND


QUARTERS
YARD
No. DESIGNATION
A Commandant
B Continental Yard
C Medical Officers
D Engineer Officer
E Construction Officer
G General Storekeeper
H Senior Aide to Comdt
I Public Works Officer
K Inspector Officer
M Asst to Engineer Officer
N Asst to Construction Officer
SAINT HELENA
F Aide to Comdg Officer
MARINE BARRACKS
A Commanding Officer
B Asst to Comdg Officer
C Instructor Marine Officers School
D Executive Officer Recruit Depot
E Post Adjutant
F Post Exchange Officer
G Officers with Marine Officers School
H Asst to Comdg Officer
Post Quartermaster
YARD STRUCTURES
No. DESIGNATION
1 Main Entrance
3 G.S.A. Stores
6 G.S.A. Oil House
9 Hull Smiths Shops
10 General Storage
11 G.S.A. Brick Building (Old)
12 Riggers Storehouse
13 C.S.P. Rope and Canvas
14 " " Survey Storehouse
15 " " Boats, Ferry, Tow Vessels
16 " " Electrical Supplies
17 " " Piping Supplies
18 Hull Shipwrights Shop
19 Officers Coal Room Store Room
21 Hull Foundry
23 Machinery Machine Shops
24 Tug Crews Mess
25 Hull Sail Lofting and Boat Shop
29 Hull Boat Shed
30 Hull Saw Mill and Joiner Shop
34 Administration Officer C.S.P. Storehouse
35 Administration Officer C.S.P. Receiver and Shipper
36 Machinery Machine Shop
38 Hull Paint Shop
39 G.S.A. Small Stores Issue Room
41 Hull Plumbers Shop
43 Hull Dock Office
44 Laboratory
46 G.S.A. Storage
47 G.S.P. Stock Material
49 Laundry
ELEVATIONS
Extreme High Water (March 1913) 9.8 ft
Mean " " 4.81 "
Low " " 0.69 "
Extreme " 3.9 ft
Coaling of Class A Quay Walls 9 ft 10 ft
General Ground Level 4.0 to 6.0 ft
LEGEND
Reinforced Steel
Brick
Concrete
Corrugated Iron
Wood
Railroads
Tarvia on Gravel
Tarvia on Macadam
Cisterns
Hydrants Fresh Water
Sea
ELIZABETH RIVER
SOUTHERN BRANCH
NAVAL HOSPITAL
United States Navy Yard
NORFOLK, VA.
MAP OF THE YARD SHOWING
IMPROVEMENTS TO JUNE 30, 1913.
ACCOMPANYING ANNUAL REPORT OF OPERATIONS FOR FISCAL YEAR 1913

about 600 feet to the Norfolk Southern property, and the entire change made by the establishment of the new harbor line is immediately in front of the Navy yard.

The above was all the evidence in chief for the complainant.

E. B. NOYES, a witness for the defendants, after being duly sworn, testified that he is acting chief draftsman in the Public Works Department in the Navy Yard, and is also a photographer; that he took the pictures filed with his evidence, marked "Noyes, Exhibit 1 and 2"; that these pictures were taken of the Greenleaf Johnson property, and that the plat filed with the pictures had marks which identified the points of which the pictures were taken; that the picture marked 916 was taken from a tug in the river, looking down the river, towards the Berkley Ferry, and shows the land end and the little bridge or opening in the southern side of the bulkhead to the log pond; that the white shed is the northern end of the property, and built on the wharf belonging to the complainant; that this wharf is shown as beyond the western side of the log pond; that the picture marked 820 is taken from the opposite side of the property, and shows the log pond complete, but does not show the wharf on which the shed above mentioned is located.

IRA JOHNSON, in rebuttal, was introduced by the defendants, and testified that he was general manager of the complainant company; that he was familiar with the river at the point in question; that the government in recent years had used the channel of the river opposite the Navy Yard and in front of the property of
56 complainant to a very large extent for the storage of its vessels, and that he had seen as many as five vessels abreast there, ranging from torpedo boats to colliers.

D. LAWRENCE GRONER,
U. S. Att'y.
L. D. STARKE, *For Himself and*
J. L. JEFFRIES, *Att'ys.*

(Here follow photos and map, marked pages 56*a*, *b*, and *c*.)

Conclusion of the Court on Merits.

Filed November 17th, 1913.

WADDILL, *District Judge*:

This cause is now before the court upon the bill and answer, the demurrer having been overruled, upon the proofs orally adduced, with the arguments of counsel thereon.

Whereupon, it appearing to the court that the case now made is different from that admitted by the pleadings at the hearing on the demurrer, in this:

(*A*) That a doubt is raised as to whether or not the complainant's wharves were placed out into the navigable waters of the Elizabeth River, as at present, pursuant to lawful state authority; and

(*B*) That the character, location and extent of the socalled log pond is set forth more in detail, and made plainer in the testimony.

The conclusion reached is (1) that it is fairly inferable from all the testimony, that the wharves and piers of the complainant, in the waters of the Elizabeth River, were erected in their present location pursuant to lawful authority, and that there is therefore no reason for changing or modifying the views heretofore expressed as respects this phase of the case. See 204 Fed., 489 and 494, where it is said:

"In the judgment of the court, the cases, in effect, agree that where the interest involved is property, and the same is lawfully
57 in the stream, and what is proposed is to take it, as distinguished from merely injuriously affecting it, it can only be done upon making just compensation therefor. The contrariety of views that apparently prevail grows out of the existence or nonexistence of some one of the conditions indicated, and arise generally in cases injuriously affecting the high lands, or resulting in incidental injury or damage to the same, or to the riparian owner's rights appertaining thereto."

(2) That as to the log pond, the same being a part of the navigable stream of Elizabeth River, the waters of which flow in and out of said pond, through flood gates at either end thereof, the complainant, as against the government, has acquired in such waters, and in the lands beneath the same over which the water flows below water mark, no title in or right thereto for which the government should pay in using the same in connection with the River and Harbor improvements.

Final Decree.

Entered November 24th, 1913.

This cause came on this day to be again heard upon the papers formerly read, the evidence duly heard in open court, and the agreed statement of facts filed in this cause.

Upon consideration whereof the court being of opinion, for the reasons stated in writing and filed with the record, that the Secretary of War had no authority under the law to remove or cause the removal of the structures in the bill, answer and proceedings mentioned, doth adjudge, order and decree that the temporary injunction heretofore granted be, and the same hereby is, made permanent.

And the complainant and the defendants having each intimated a desire to appeal from this decree, they are allowed fifteen days within which to present their petition for such appeal, together with their asignments of error.

EDMUND WADDILL, JR.,
United States District Judge.

Norfolk, Virginia, November 24, 1913.

58 *Petition for Appeal and Assignment of Errors of Lindley M. Garrison et al.*

Filed November 26th, 1913.

To the Honorable Judges of the United States Circuit Court of Appeals for the Fourth Circuit:

The petition of Lindley M. Garrison, Secretary of War of the United States, and Henry S. Breckenridge, Assistant Secretary of War of the United States, defendants in the above entitled cause, respectfully represents that they are aggrieved by final decree of the District Court of the United States for the Eastern District of Virginia, entered in this cause at Norfolk, on the 24th day of November, 1913.

The petitioners assign the following errors:

1. The court erred in overruling the defendants' demurrer.

2. The court erred in continuing the temporary injunction.

3. The court erred in holding that the notice of the Secretary of War (Exhibit "A," Complainant's Bill) was not a conclusive adjudication and determination of the obstruction, in the manner therein set out, of the navigation of the Southern Branch of the Elizabeth River.

4. The court erred in not holding that the Act of March 3, 1899, gave to the Secretary of War full power and authority to make, declare and define the line of navigability in the Elizabeth River, and to change and re-establish the same when, in his opinion, the interests of commerce and navigation require such change and re-establishment, and to compel the removal of obstructions placed therein within such re-established lines, however placed.

5. The court erred in holding that the structures in question were lawfully established and maintained.

6. The court erred in holding that a riparian proprietor acquires a fee simple title to the bottom of a navigable river, to-wit, the Elizabeth River, when and after he has erected improvements
59 on piles or by fill on such bottom in front of his high land.

7. The court erred in holding that compensation must first

be made to complainant before the Secretary of War may lawfully require the removal of the structures in the bill and proceedings mentioned.

8. The court erred in not holding that the authority given by the Virginia statute (Code, 1904, Sec. 944-*a*, Subsection 31), to a riparian owner on a navigable water course to erect structures in the water to the line of navigability conferred, as against the paramount power of Congress over said water course, a mere license, revocable under the provisions of Section 12 of the Act of March 3, 1899, by the Secretary of War, whenever in the opinion of that officer the needs of commerce and navigation require such revocation.

Petitioners therefore hereby respectfully appeal from the said decree to the Circuit Court of Appeals for the Fourth Circuit, and pray that the same, together with a full transcript of the record, may be sent to the said court without delay, and that said court will proceed to hear said cause, and that the said decree, for the reasons set out above and for other reasons to be assigned at the bar, may be reversed and annulled, and that petitioners may have such proper relief as in law and justice they may be entitled to receive.

LINDLEY M. GARRISON,
Secretary of War,
HENRY S. BRECKENRIDGE,
Assistant Secretary of War,
By D. LAWRENCE GRONER,
United States Attorney.

Stipulation of Counsel as to Printing of Record.

Filed December 4th, 1913.

It is hereby stipulated and agreed that the clerk of this court shall make up a transcript of the record in the above styled cause, transmit the same to the Clerk of the United States Circuit Court of
60 Appeals for the Fourth Circuit, at Richmond, Va., and be printed, in accordance with Rule 23 of that court.

D. LAWRENCE GRONER,
Counsel for Lindley M. Garrison, et al., Appellants.
L. D. STARKE &
J. L. JEFFRIES,
Counsel for Greenleaf Johnson Lumber Co.

Dec. 4th, 1913.

Petition for Appeal and Assignment of Errors of Greenleaf Johnson Lumber Co.

Filed December 6th, 1913.

To the Honorable Judges of the United States Circuit Court of Appeals for the Fourth Circuit:

The petition of Greenleaf Johnson Lumber Company, a corporation, complainant in the above entitled cause respectfully represents

that it is aggrieved by so much of the final decree of the District Court of the United States for the Eastern District of Virginia entered in this cause at Norfolk, on the 24th day of November, 1913, as incorporates therein the following language: "For the reasons stated in writing and filed with the record."

Petitioner assigns the following errors:

1st. The court erred in incorporating in said decree the following language: For the reasons stated in writing and filed with the record."

2nd. The court erred in assigning as one of the reasons for its decree so much of its said opinion as is embraced in paragraph 2 thereof, as follows: "That as to the log pond the same being a part of the navigable stream of the Elizabeth River the waters of which flow in and out of said pond through flood gates at either end thereof, the complainant as against the government has acquired in such waters and in the lands beneath the same over which the water flows below low water mark no title in or any right thereto for which the government should pay in using the same in connection with the river and harbor improvements," is not necessary to the decision of this case because said language does not correctly state the
61 law and may operate to the prejudice of this complainant in any condemnation proceeding which the United States may undertake.

Your petitioner therefore respectfully appeals from so much of said decree as is hereinbefore specified and prays that the same, together with a full transcript of the record may be sent to the said court without delay, and that the said court will proceed to hear the said cause and that the said decree for the reasons set out above, and for other reasons to be assigned at the bar, may be so amended as to strike therefrom the said language complained of and that as so amended may be affirmed, and that petitioner may have such other and further relief as in law and justice it may be entitled to receive.

L. D. STARKE,
JEFFRIES, WOLCOTT, WOLCOTT & LANKFORD,
Counsel for Petitioner, Greenleaf Johnson Lumber Co.

Præcipe of Greenleaf Johnson Lumber Co.

Filed December 6th, 1913.

To the Clerk of said Court:

The appellant, Greenleaf Johnson Lumber Company, hereby indicates the following portions of the record to be incorporated in the transcript of the appeal now being taken by it:

1st. The bill and the demurrer thereto and the opinion filed on February 20th, 1913, and the decree of the court overruling the demurrer.

2nd. The answer of the defendants.

3rd. All the exhibits.

4th. All appellate papers.

5th. The statement of testimony in narrative form covering the depositions and the evidence and the stipulation of counsel as to facts and the evidence produced at the trial by counsel for
62 the appellants and accompanying this precipe and prepared in accordance with Rule 10 of Court in such case made and provided.

6th. The final decree.

7th. Stipulation of counsel as to printing of transcript of record.

L. D. STARKE,
JEFFRIES, WOLCOTT, WOLCOTT, & LANKFORD,
Counsel for Greenleaf Johnson Lumber Company.

Agreement as to Record.

Filed December 11th, 1913.

It is agreed between the parties hereto that the following shall constitute the record to be certified by the Clerk of the District Court to the Circuit Court of Appeals upon the appeal and cross-appeal:

1. Bill of complaint.
2. Demurrer.
3. Excerpts from injunction order entered July 10th, 1912, as follows:

"It is ordered that a temporary injunction be awarded, enjoining and restraining Henry L. Stimson, Secretary of War of the United States, Robert Shaw Oliver, Assistant Secretary of War of the United States, as well as their agents and employees and all other persons acting under their authority or direction, as well as all other persons who may attempt to do so, from taking or removing or in any way interfering with the complainant's wharf, pound, structures, or other property along or upon the water front of its property upon the Southern Branch of the Elizabeth River, as mentioned and described in the said bill, until the further order of this court."

4. Opinion of the court rendered February 20th, 1913.
63 5. Order overruling the demurrer and continuing injunction, entered July 3rd, 1913.
6. Certificate showing that on June 28th, 1913, Lindley M. Garrison and Henry S. Breckenridge were substituted for Henry L. Stimson and Robert Shaw Oliver as defendants.
7. Answer of defendants filed July 18th, 1913.
8. Agreed statement of facts and evidence, and exhibits with evidence.
9. Opinion of court on merits, filed November 17th, 1913.
10. Final decree entered November 28th, 1913.
11. Order allowing appeal of defendant, with assignment of errors, entered December 6th, 1913.
12. Order allowing cross-appeal of complainant, with assignment of errors, entered December 6th, 1913.

D. LAWRENCE GROVER,
U. S. Att'y.
L. D. STARKE &
J. L. JEFFRIES,
Counsel for Plaintiff.

Memorandum of Original Papers Accompanying Transcript of Record.

(1) Petition for appeal of Lindley M. Garrison, Secretary of War of the United States, and Henry C. Breckenridge, Assistant Secretary of War of the United States, filed November 26th, 1913.

(2) Order allowing the said petitioners an appeal, entered by the court on November 26th, 1913.

(3) Citation, dated November 26th, 1913. Service accepted November 8th, 1913.

(4) Petition for appeal of Cleveland Osborne Lumber Company, filed December 8th, 1913.

(5) Order allowing the said petitioner an appeal, entered by the court on December 8th, 1913.

(6) Citation, dated December 8th, 1913. Service accepted December 8th, 1913.

Certificate of the Clerk.

United States of America,
Eastern District of Virginia, ss:

I, Joseph P. Bondy, Clerk of the District Court of the United States for the Eastern District of Virginia, do hereby certify that the foregoing is a full and true transcript of the record of the proceedings and judgment of the said court, as appointed by counsel of record, in the therein entitled cause.

In testimony whereof, I have hereunto set my hand and affix the seal of the said court, at Norfolk, in said district, on this 17th day of December, 1913.

[SEAL OF COURT.]

JOSEPH P. BONDY, Clerk,
By J. LOUIS HILL, Deputy Clerk.

Costs of court	$15.25
Cost of transcript	10.30
	$25.55

Paid by appellants and cross-appellees.

65 On the same day, to-wit: December 26, 1913, the original petitions for appeal, with allowing appeals, and citations, as certified up under No. 7 of folio 10

Same day, appearance of D. Lawrence Groner, United States Attorney, and Hiram M. Smith, Assistant United States Attorney, is entered for the appellees and cross-appellees.

Same day, appearance of L. D. Starke and John L. Saffold, is entered for the appellee and cross-appellant.

January 7, 1914, twenty-five copies of the printed record are filed.

March 2, 1914, (February Term 1914), cause came on to be heard before Pritchard and Woods, Circuit Judges, and Dayton, District Judge, and is argued by counsel and submitted.

June 1, 1914, (May Term 1914), the court announced and filed its opinion, which is as follows, to-wit:

Opinion.

Filed June 1, 1914.

66 & 67 United States Circuit Court of Appeals, Fourth Circuit.

No. 1239.

LINDLEY M. GARRISON, Secretary of War of the United States, and Henry S. Breckenridge, Assistant Secretary of War of the United States, Appellants and Cross-appellees,

versus

GREENLEAF JOHNSON LUMBER COMPANY, a Corporation, Appellee and Cross-appellant.

Cross-appeals from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

[Argued March 2, 1914. Decided June 1, 1914.]

Before Pritchard and Woods, Circuit Judges, and Dayton, District Judge.

D. Lawrence Groner, United States Attorney (Hiram M. Smith, Assistant United States Attorney on brief), for appellants and cross-appellees, and John L. Jeffries, (L. D. Starke and Jeffries, Wolcott, Wolcott & Lankford on brief), for appellee and cross-appeliant.

WOODS, *Circuit Judge:*

The complainant, owner of about eight acres of land on the Elizabeth River opposite the navy yard at Norfolk, Virginia,
68 brought this suit to enjoin the Secretary of War from threatened removal of its wharf and other structures used in its business as a manufacturer and shipper of lumber. The District Court overruled a demurrer to the bill and after hearing the answer and testimony on issues of fact granted a permanent injunction holding that removal of the wharves and other structures would be taking private property without compensation.

There is little dispute as to the facts. Under the law of Virginia, the complainant as riparian owner has fee simple title to low water mark in the bed of the river. At some time before the year 1873, the complainant built a wharf for shipping its manufactured lumber, and by means of piles enclosed enough water surface to make a pond for logs floated down the river for manufacture. As nearly

as can be ascertained the first port warden or harbor line, which indicated the limit beyond which riparian owners could not use the water front, was established at this point in the river in 1876, by harbor commissioners under authority conferred by statute law of Virginia. When the harbor line was established it turned out that the complainant's wharf and log pond was outside the line of navigation. In 1883 or 1884 the wharf and other structures were improved and enlarged to their present dimensions, still not extending beyond the line of navigation. In 1890 the same harbor line was adopted by the Secretary of War in behalf of the United States under authority conferred by act of Congress, as the national government's limit of navigable water. On 12 June, 1911, the Secretary of War under the authority of an act of Congress established a new navigation or harbor line which brings a portion of complainant's structures within the navigable area of the river. The complainant was notified of the change, and the necessity of the removal of its structures; and negotiations for settlement of complainant's claim for compensation indicated an acknowledgment of the right of compensation by the officials of the office of the Secretary of War. Agreement could not be reached as to the value, and condemnation proceedings were instituted on behalf of the government.

69 While these proceedings were pending, the Secretary of War, taking the position that the complainant had assumed the risk of establishment and change in the line of navigation when it located its structures, abandoned the condemnation proceedings and notified complainant of his intention to remove whatever portion of its structures fell within the new line of navigation. Thereupon the complainant, claiming the right of compensation, brought this suit for injunction.

The general principles under which the relative rights of the owner of the shore of navigable water and of the State, and of the United States are to be determined have been so often and so elaborately set out by the Supreme Court of the United States and other tribunals that they require no discussion. The extent of the title and of the rights of the riparian owner in the soil under navigable water is fixed by State law, and under the law of Virginia the complainant owned the soil under the water to low water mark. But all State laws and regulations with respect to navigable waters and all rights acquired under them are subject to the paramount right of the United States to appropriate any portion of the submerged soil for purposes of navigation. Hence the appropriation by the United States for purposes of navigation of the soil under the water to which the complainant has title under the State law is not a taking of private property and the complainant has no right to compensation therefor.

Under this principle, that the use and title of the riparian owner is subject to the dominant right of the United States it has been held that it is not taking private property to require a bridge to be changed or removed, or a tunnel to be lowered, or to erect dams or dykes which incidentally cut off access to deep water or access to a landing in the channel, or to flood lands by the erection of revet-

ments along the banks of a navigable stream. Gilman v. Philadelphia, 3 Wall., 713; Illinois Cen. R. R. v. Illinois, 146 U. S., 446; Shrively v. Bowlsby, 152 U. S., 1; Gibson v. United States, 166 U. S., 269; Scranton v. Wheeler, 179 U. S., 141; Bedford v. United
State, 192 U. S., 217; C. B. & Q. Ry. Co. v. Drainage Com-
70 missioners, 200 U. S., 561; West Chicago R. R. v. Chicago,
201 U. S., 506; Union Bridge Co. v. United States, 204 U. S., 364; Monongehela Bridge v. United States, 216 U. S., 177; Hannibal Bridge Co. v. United States, 221 U. S., 194; Philadelphia Co. v. Stimson, 223 U. S., 605. This dominant right of the United States is thus stated in Union Bridge Co. v. United States, supra:

"Although the bridge, when erected under the authority of a Pennsylvania charter, may have been a lawful structure, and although it may not have been an unreasonable obstruction to commerce and navigation as then carried on, it must be taken, under the cases cited, and upon principle, not only that the company when exerting the power conferred upon it by the State, did so with knowledge of the paramount authority of Congress to regulate commerce among the States, but that it erected the bridge subject to the possibility that Congress might, at some future time, when the public interest demanded, exert its power by appropriate legislation to protect navigation against unreasonable obstructions."

In Scranton v. Wheeler, supra, the court uses this language:

"The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bounding on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such waters. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation."

In applying the general principle in many forms these authorities left open the specific question on which this case depends: Is the establishment of harbor lines or lines of navigation under authority
of the act of Congress such a consent or invitation by the
71 United States to riparian owners to build to that line wharves and other structures that such structures must be regarded, as against the United States, private property which cannot be taken without compensation even for purposes of navigation? In Yesler v. United States, 146 U. S., 646, a harbor line is defined as the line beyond which wharves and other structures cannot be extended. Prosser v. Northern Pac. Ry., 152 U. S., 59. In these two cases it was held that the mere laying out of new harbor lines so as to include structures before without the harbor lines, was not a taking of private property without compensation; but the court expressly left open the question whether requiring the removal of such structures up to the line would be a taking of private property. As to such a structure as a bridge not used in direct aid of navigation, it

was held in Philadelphia v. Stimson, supra, that the harbor line might be changed, and that the bridge company could not claim compensation when required to move its bridge to conform to the new line.

The case then comes to the still more definite question whether on the point at issue there is a distinction between bridges and other like structures not directly aiding navigation, and wharves and other structures used for purposes of navigation. Laying aside for the moment the statute on the subject, the argument in favor of the distinction may be thus stated: The nation holds the navigable waters of the country in trust to keep them open for the free use of all in so far as it is possible for all to enjoy them in common, and to allow the riparian owner to promote navigation by the erection of wharves and other structures. While the first use is paramount and the other subordinate, the latter is very important to the public, inasmuch as it is impossible for the United States to erect and maintain all the piers, wharves and other structures necessary to the conduct and advancement of navigation along the numerous navigable streams. This use of the riparian owner for his own good and the public good would be greatly impaired unless the dominant right to free public navigation be so managed as to give it stability and certainty.

72 It is for the purpose of giving this stability that the government establishes harbor lines. Hence it may be argued that the fixing of the lines should be regarded as an invitation to the riparian owner to come to that line and promote his own interest and that of the public by erecting wharves and other structures in aid of commerce. These lines are established, it is true, to limit, but they are established also to promote the use of the water by giving to it the assurance of stability. At many places the use of the soil under the water is of vast value if it can be depended on as stable, but this value would shrink to nothing if laying out the harbor line gave no assurance of stable use. Permanent and expensive docks and wharves would not be erected if they could be taken without compensation.

If this argument be sound, and the laying out of harbor lines be regarded as an assurance to the riparian owner that he may safely invest in wharves and piers erected by him in aid of navigation, the case of Monongahela Navigation Co. v. United States, 148 U. S., 312, would be conclusive authority that for the taking of such wharves compensation must be made. It is true that case, in some of its expressions, seems to be irreconciliable with some of the later cases above cited. But its authority was recognized in Lewis Blue Point Oyster Co. v. Briggs, 229 U. S., 82, for the proposition that structures erected in a navigable stream under the affirmative authorization of the United States could not be removed without compensation even in promotion of navigation.

The statute of 1888 under which the harbor line here involved was established is as follows:

"SEC. 12. Where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors, he may, and is hereby, authorized to cause such lines to be established, beyond which no piers or

wharves shall be extended or deposits made except under such regulations as may be prescribed from time to time by him."

The argument is not without force that while this authorization to the Secretary of War is negative in form, yet when it is
73 taken in connection with the power conferred on him to grant permission, under regulations prescribed by him, to erect structures beyond the harbor line, it implies affirmative authorization to the riparian owner to erect structures to the harbor line without special authorization. In construing a similar provision of the act of 1899, 31 Stat. 1151, the Supreme Judicial Court of Maine, in Maine Water Co. v. Knickerbocker, etc., Co., 59, Atl. (Me.), 953, after elaborate discussion held that the statute necessarily implied affirmative authorization.

We have thus stated what appears to us the strongest considerations in favor of the claims of the complainant. It cannot be doubted, however, that the Supreme Court of the United States in its later decisions has taken the larger view that under the Constitution of the United States, the control and development of all navigable streams remains in the Federal Government, and that no rights can be acquired against it except under affirmative conferment of Congress; that the harbor lines of the Federal Government designating the limit of navigation are changeable at its discretion, and that all who build wharves or other structures in, under, or over the water of navigable streams take the risk of whatever Congress either directly or through the Secretary of War may see fit to do for the promotion of navigation. All doubt upon these propositions seems to be set at rest by United States v. Chandler-Dunbar Co., 229 U. S., 53, and Lewis Blue Point Oyster Co. v. Briggs, 229 U. S., 82. In the former case Mr. Justice Lurton thus treats the very question here involved:

"That riparian owners upon public navigable rivers have in addition to the rights common to the public certain rights to the use and enjoyment of the stream which are incident to such ownership of the bank, must be conceded. These additional rights are not dependent upon title to the soil over which the river flows, but are incident to ownership upon the bank. Among these rights of use and enjoyment is the right, as against other riparian owners, to have the stream come to them substantially in its natural state, both in quantity and quality. They have also the right of access to deep water, and when not forbidden by public law may construct for this purpose, wharves, docks, and piers in the shallow water of the
74 shore. But every such structure in the water of a navigable river is subordinate to the right of navigation, and subject to the obligation to suffer the consequences of the improvement of navigation, and must be removed if Congress in assertion of its power over navigation shall determine that their continuance is detrimental to the public interest in the navigation of the river."

It is true in that case the license from the Secretary of War under which the Chandler-Dunbar Company constructed its works for utilizing the water power was by its terms revocable at will; but it cannot be doubted that the court puts piers and wharves on the same footing as other structures like bridges and water works; and it was

expressly decided in Philadelphia v. Stimson, that as to these the lines of navigation were changeable at will and that the owner took the risk of change.

The Chandler-Dunbar Company case also holds that the propriety of the change in navigable water under the authority of Congress is not a matter for judicial inquiry.

The argument that this view of the meaning of harbor lines and of the power of the Congress will impede rather than promote navigation by discouraging private enterprise in the construction of wharves and piers loses much of its force when it is remembered that riparian owners may well assume that changes in the harbor lines requiring the removal of valuable structures will not be made by the government except where clearly necessary for the promotion of navigation.

Reversed.

75 & 76 *Decree.*

Filed and Entered June 4, 1914.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1239.

LINDLEY M. GARRISON, Secretary of War of the United States, and Henry S. Breckenridge, Assistant Secretary of War of the United States, Appellants and Cross-appellees,

vs.

GREENLEAF JOHNSON LUMBER COMPANY, a Corporation, Appellee and Cross-Appellant.

Cross-appeals from the District Court of the United States for the Eastern District of Virginia.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby reversed; and that this cause, be, and the same is hereby, remanded to the District Court of the United States for the Eastern District of Virginia, at Norfolk for further proceedings in accordance with the opinion of this Court.

June 4, 1914.

C. A. WOODS,
Circuit Judge.

Petition to Stay Mandate.

Filed June 13, 1914.

To the Honorable Judge of the United States Circuit Court of Appeals, Fourth Circuit, at Richmond, Virginia:

The undersigned, Greenleaf-Johnson Lumber Company, appellee in the chancery cause of Lindley M. Garrison, Secretary of War, and others, appellant, against Greenleaf-Johnson Lumber Company, appellee, respectfully moves this Honorable Court to sus-
77 & 78 pend the issuance of the mandate upon the decree of this Court, reversing the decree of the United States District Court for the Eastern District of Virginia at Norfolk, Virginia, from which appeal was taken to this Honorable Court, in order to permit the undersigned appellee to perfect appellate proceedings therefrom to the Supreme Court of the United States.

GREENLEAF-JOHNSON LUMBER COMPANY,
By LUCIEN D. STARKE,
J. L. JEFFRIES,
Its Attorneys.

Order Staying Mandate.

Filed June 13, 1914.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1239.

LINDLEY M. GARRISON, Secretary of War of the United States, and Henry S. Breckenridge, Assistant Secretary of War of the United States, Appellants and Cross-Appellees,
vs.
GREENLEAF JOHNSON LUMBER COMPANY, a Corporation, Appellee and Cross-appellant.

Cross-appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

Upon the application of the Greenleaf Johnson Lumber Company, a corporation, by its counsel, and for good cause shown.

It is ordered that the mandate of this Court in the above entitled cause, be, and the same is hereby stayed for 60 days from this date.

J. C. PRITCHARD,
Senior Circuit Judge, Presiding.

June 13, 1914.

79 & 80 *Petition of Greenleaf Johnson Lumber Company for an Appeal to the Supreme Court of the United States.*

Filed September 8, 1914.

In the Supreme Court of the United States.

LINDLEY M. GARRISON, Secretary of War of the United States, and Henry S. Breckenridge, Assistant Secretary of War of the United States, Appellants and Cross-appellees,

vs.

GREENLEAF JOHNSON LUMBER COMPANY, a Corporation, Appellee and Cross-appellant.

The *petition of* Greenleaf Johnson Lumber Company, a corporation, feeling itself aggrieved by a decree of the United States Circuit Court of Appeals of the Fourth Judicial Circuit, entered on the 4th day of June, 1914, in the above entitled cause, reversing a decree of the District Court of the United States for the Eastern District of Virginia, entered in said cause on November 24th, 1913, and dismissing the bill of complaint filed by your petitioner, does hereby appeal from said decree to the Supreme Court of the United States and prays that its appeal may be allowed and that a transcript of the record of the proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

GREENLEAF JOHNSON LUMBER COMPANY,
By L. D. STARKE,
J. L. JEFFRIES,
Its Counsel.

Assignment of Errors.

Filed September 8, 1914.

In the Supreme Court of the United States.

LINDLEY M. GARRISON, Secretary of War of the United States, and Henry S. Breckenridge, Assistant Secretary of War of the United States, Appellants and Cross-appellees,

vs.

GREENLEAF JOHNSON LUMBER COMPANY, a Corporation, Appellee and Cross-appellant.

81 & 82 The petitioner in this cause in connection with its petition for an appeal from the decree of the United States Circuit Court of Appeals for the Fourth Judicial Circuit, entered on the 4th day of June, 1914, reversing a decree of the District Court

of the United States for the Eastern District of Virginia, entered in said cause on November 24th, 1913, and dismissing the bill of complaint filed by your petitioner, makes the following assignments of error, which it avers occurred upon the trial of this cause, to-wit:

1st. The Court erred in reversing said decree, the effect of which was to authorize the taking of complainant's wharf for public purposes without due process of law and without compensation.

2nd. The Court erred in holding that complainant's wharf, established and maintained as shown by the evidence in this suit, was not private property, which could not be taken without compensation, as provided in the Constitution of the United States.

3rd. The Court erred in holding that after complainant's wharf had been established under and by virtue of the laws of the State of Virginia and after the harbor line of the State had been adopted by Federal authority and complainant's wharf had been recognized as lawfully established and maintained by both State and Federal authorities, the said harbor line could lawfully be changed and at the same time complainant's wharf could be taken and removed without just compensation being made therefor.

4th. The Court erred in not holding that under the evidence in this case, the purposes for which the channel of Elizabeth River is to be widened and complainant's wharf removed were not in the interests of navigation and commerce, but to accomplish the private purposes of the Federal Government in constructing a storage ground for its vessels in front of its Navy Yard and in using said river at that place for its purposes in operating and maintaining the same.

83 & 84 5th. The Court erred in not holding that there is no inherent authority in the office of Secretary of War nor any statutory provisions conferring authority in that officer to take and remove, or to order the taking or removal of your complainant's wharf in the manner contemplated and intended, as shown in this suit.

6th. The Court erred in not holding that the Act of March 4th, 1911, making appropriations for the Naval Service for the year ending June 30th, 1912, conferred no authority or right upon the Secretary of War of the United States to take or remove or order the taking and removal of complainant's wharf in the manner alleged in the bill.

7th. The Court erred in not granting a perpetual injunction as prayed for in the complainant's bill.

GREENLEAF JOHNSON LUMBER COMPANY,
By L. D. STARKE,
J. L. JEFFRIES,
Its Counsel.

Order Allowing Appeal.

Filed September 8, 1914.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1239.

LINDLEY M. GARRISON, Secretary of War of the United States, and Henry S. Breckenridge, Assistant Secretary of War of the United States, Appellants and Cross-appellees,

vs.

GREENLEAF JOHNSON LUMBER COMPANY, a Corporation, Appellee and Cross-appellant.

Cross-appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

Upon the foregoing petition and assignment of errors, it is ordered that an appeal to the Supreme Court of the United States be allowed as prayed for.

J. C. PRITCHARD,
U. S. Circuit Judge.

Sept. 8, 1914.

Original.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Lindley M. Garrison, Secretary of War of the United States, and Henry S. Breckenridge, Assistant Secretary of War of the United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C. within thirty days from the date hereof, pursuant to an appeal from a decree of the United States Circuit Court of Appeals for the Fourth Circuit at Richmond, in your favor passed in a cause in said Court wherein the Greenleaf Johnson Lumber Company, a corporation, is the appellee and cross-appellant, and you are the appellants and cross-appellees, to show cause, if any there be, why the decree rendered against the said appellee and cross-appellant in said cause mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this eighth day of September, in the year of our Lord one thousand nine hundred and fourteen.

J. C. PRITCHARD,
U. S. Circuit Judge.

Service accepted.
RICHARD H. MANN,
United States Attorney.

[Endorsed:] 1239. Citation. Original.

85 & 86 *Citation.*

Issued September 8, 1914.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Lindley M. Garrison, Secretary of War of the United States, and Henry S. Breckenridge, Assistant Secretary of War of the United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C. within thirty days from the date hereof, pursuant to an appeal from a decree of the United States Circuit Court of Appeals for the Fourth Circuit at Richmond, in your favor passed in a cause in said Court wherein the Greenleaf Johnson Lumber Company, a corporation, is the appellee and cross-appellant, and you are the appellants and cross-appellees, to show cause, if any there be, why the decree rendered against the said appellee and cross-appellant in said cause mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this eighth day of September, in the year of our Lord one thousand nine hundred and fourteen.

J. C. PRITCHARD,
U. S. Circuit Judge.

Service accepted.
RICHARD H. MANN,
United States Attorney.

87 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true transcript of the record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 17th day of September, A. D., 1914.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit,
By CLAUDE M. DEAN,
Deputy Clerk.

Endorsed on cover: File No. 24,422. U. S. Circuit Court Appeals, 4th Circuit. Term No. 678. The Greenleaf Johnson Lumber Company, appellant, vs. Lindley M. Garrison, Secretary of War of the United States, and Henry S. Breckenridge, Assistant Secretary of War of the United States. Filed October 30th, 1914. File No. 24,422.

Supreme Court, U. S.
FILED
DEC 18 1914
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 678.

GREENLEAF-JOHNSON LUMBER COMPANY,
APPELLANT,

vs.

LINDLEY M. GARRISON, SECRETARY OF WAR, ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

NOTE ON MOTION TO ADVANCE.

Comes now Greenleaf-Johnson Lumber Company, appellant, by John L. Jeffries, its attorney, and says that the appellant does not object to the granting of the motion of the appellee to advance the above-entitled cause for a hearing on a day convenient to the court during the present term, except that it will be impossible to print the record and prepare the case for argument by the 4th of January. Notice of this motion was received by telegram on December 15. The record has not as yet been printed, nor has the brief

on behalf of the appellant been prepared, as an early hearing of the case was not anticipated.

Counsel for appellant suggests that if the case is advanced it be set for some later day than January 6, 1919.

JAMES L. DEFFEBACH,
Attorney for Appellant.

December 16, 1918.

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

GREENLEAF-JOHNSON LUMBER COMPANY, appellant,
v.
LINDLEY M. GARRISON, SECRETARY OF WAR, et al.
} No. 678.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

MOTION TO ADVANCE.

Comes now the Solicitor General, on behalf of the appellee, and moves the court to advance the above-entitled cause for hearing on a day convenient to the court during the present term.

The Greenleaf-Johnson Lumber Co. is the owner of about eight acres of land, partly submerged, situate in the South Branch of the Elizabeth River, opposite the navy yard at Norfolk, Va., on which it maintains a wharf and other structures used in its business as manufacturer and shipper of lumber. On June 12, 1911, the Secretary of War, acting under authority of section 12 of the act of August 11, 1888 (25 Stat. 425), established a new naviga-

tion or harbor line, thereby causing a portion of appellant's wharf to lie within the navigable area of the river. On March 4, 1911, Congress authorized the purchase of land and the widening of the channel at the point where said wharf is situated (36 Stat. 1275). Appellant was duly notified of the change in the harbor line and of the necessity of removing such part of the wharf as extended beyond that line. Negotiations for the determination of the amount of compensation to be paid were entered into, and the parties being unable to reach an agreement, the Government instituted condemnation proceedings. Thereafter the Secretary of War abandoned said proceedings and, taking the position that appellant had assumed the risk of establishment and change in the line of navigation when it erected its structures, notified appellant of his intention to remove whatever portion of the wharf fell within the new line.

Thereupon appellant, claiming the right of compensation, filed its bill in the District Court for the Eastern District of Virginia praying an injunction restraining such contemplated action. The District Court granted a permanent injunction, on the ground that the removal would constitute a taking of private property without compensation. The Circuit Court of Appeals reversed the lower court, sustaining the right of the Government to remove, in the interests of navigation, such part of the wharf as extended to the channelward of the new harbor line; held such removal not to be a taking of

private property for which compensation must be paid; and remanded the case for further proceedings. From this decision, appellant brings the case here.

The final determination of this appeal at an early day is most desirable in the public interests. The mandate of the Circuit Court of Appeals has been withheld pending appeal to this court, and until the injunction of the District Court is dissolved it is manifest that the Government can not proceed with necessary public improvements authorized by Congress.

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,
Solicitor General.

DECEMBER, 1914.

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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1914.

Record No. 678.

GREENLEAF JOHNSON LUMBER COMPANY, A CORPORATION, APPELLANT,

VS.

LINDLEY M. GARRISON, SECRETARY OF WAR OF THE UNITED STATES, AND HENRY S. BRECKENRIDGE, ASSISTANT SECRETARY OF WAR OF THE UNITED STATES, APPELLEES.

ON APPEAL FROM UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

BRIEF OF COUNSEL FOR APPELLANT.

FACTS.

It appears from the record that prior to the year 1873 the Greenleaf Johnson Lumber Company, the appellant, or its

predecessors, owned and were possessed of the highland, from which the property now in dispute was constructed, and that being so in possession, it constructed about the year 1873 a wharf and two certain fills into the Elizabeth river. In addition to this wharf and these two certain fills, it constructed a wharf extending into the river from two points on the shore and connected at the outer extremities, the whole forming a continuous wharf of three sides surrounding the water which they thus enclosed, the fourth side being the highland. This wharf was constructed by driving two parallel lines of piling, on the north side and outer or western end, forty feet apart, and filling in between with earth and slabs, and on the southern side it constructed a fill about one hundred feet wide extending out into the river about two hundred feet, leaving openings in the north and south sides thereof as entrances to the space within, which was covered with water and designed for the storage of its logs; these entrances, however, were decked over with lumber so as to make a continuous wharf. The space within this wharf was called a log pond, and was simply a shallow flat, which had to be dredged to a depth sufficient to float logs. When completed the wharf was a solid fill of earth and slabs held in position by the parallel lines of piles above described. It was designed, intended and used as a wharf for the storage and shipment of the appellant's manufactured product, the space within being used for the reception of the logs brought to the company's factory to be manufactured into lumber.

The description of this property as set forth in the record, page 36, together with the map which is a part of the record, and the testimony of witnesses, is as follows: The structure where the word wharf is written on the right of the map is a regularly constructed wharf made of piles filled in with dirt and decked with lumber. Next to and

to the left of this wharf is a projection on which appears the word "fill," which is a fill composed of earth and slabs surrounded by piles. The next projection to the left showing a circle marked "green" is a fill of earth and shells surrounded by piles, and the map itself shows that it is about 100 feet in width, and according to its scale extends into the river about 200 feet. This forms one side, or the north end, of the wharf, surrounding what is called the log pond, and is connected with the front portion of the wharf by a bridge, as above described, under which logs were floated from the river to the basin. The log pond, as pointed out, was enclosed on the south and west by two lines of piles filled in as above described, while the wharf or fill marked "green" formed the north end thereof. It also appears from the evidence (record page 43) that upon the north side of the wharf surrounding the basin called a log pond, there had been erected a shed for the storage of lumber, and on the south side a coal bin, and that a tram road had been constructed on the entire western or outer end of the wharf; that a railroad track had been laid upon the southern end of the wharf surrounding the log pond and that the same was connected with the Belt Line railroad; that ships used to moor at the western or outer end of the wharf and received their loads of lumber from the same. In recent years the outer end of this wharf had been allowed to become out of repair, but the owners were about to repair the same and were only prevented from so doing by the proceedings which the Government instituted several years ago for its condemnation, and afterwards by the notice, which the Secretary of War served upon the owners, of his intention to take and destroy the same. (See testimony of S. L. Spratley, page 44 of the record.)

About the year 1876 the State of Virginia established for the Norfolk harbor, lines (now known as port warden's

lines) prescribing limits beyond which riparian owners could not extend or maintain their wharves. These lines were located outside of the wharves and projections which had been erected by the Greenleaf-Johnson Lumber Company as above described and which are now in question; so that no part thereof extended beyond the line of navigation as established by the State of Virginia. In the year 1905, the Board of Harbor Commissioners granted to the Greenleaf-Johnson Lumber Company permission to repair its wharfs, which was done, and the same were enlarged and improved to their present dimensions. In 1909, the Federal Government, through the Secretary of War, established the same line as the recognized harbor line fixed by the Government, and it so remained until the recent establishment of the present harbor lines on June 15, 1911. The establishment of the line in 1909 was the first assumption of authority by the Federal Government over the harbor lines of Norfolk harbor, and it will be observed that at no time was any portion of the property of the Greenleaf-Johnson Lumber Company outside of the prescribed line until the change therein made on June 15, 1911. It will be observed, too, that the only practical change made in the harbor line when first established in 1911 was in front of the Norfolk Navy Yard, that it shrinks the outer end of the structure, marked wharf on the map, taking in about two feet of its entire width, defects inland and cuts off the outer end of the projection or wharf marked "B," proceeds southwardly, and, continuing its deflection inland, takes off more than one-half of the solid wharf marked "green," almost the entire portion of the basin known as the log pond, and 200 feet of the southern side of said wharf which surrounds the same, and leaves on the said side the whole of the eastern side thereof, thus practically

In July, 1911, negotiations were opened between the Navy Department and the appellant looking to the purchase of this property for the purposes of the navy and the widening of the channel opposite the navy yard, and the appellant was requested to name a price which it would be willing to accept for that portion of the wharf which extended beyond the harbor line as re-established by the Secretary of War, in which it was stated that the department was willing to pay a fair and reasonable price therefor. The camplainant named a price which it considered a fair valuation of the property, but the Acting Secretary of the Navy replied that he considered the price exorbitant, and thereafter, on the 23rd of November, 1911, instituted proceedings in the District Court of the United States for the Eastern District of Virginia for the condemnation of this property by the United States Government.

Complainant made no resistance to these proceedings, but filed an answer to the petition which was filed therein, in which it recognized the right of the Government to take the same for its purposes, provided just compensation was paid therefor. Both parties proceeded to have the value of the property ascertained and a jury was selected to ascertain the value thereof. The jury indicated what was, in their opinion, the value of the property, but before an order of condemnation had been entered the Government dismissed the condemnation proceedings and the case was dismissed from the docket of the court. Thereafter, on May 3rd, 1912, Honorable Robert Shaw Oliver, Assistant Secretary of War, representing the Honorable Henry L. Stimpson, then Secretary of War of the United States, and acting at the request of the Secretary of the Navy of the United States, caused a notice, dated April 22nd, 1912, to be served upon the appellant looking to a removal of that portion of the said wharf which lies to the west of the harbor line

which had been re-established on June 12th, 1911. This notice, which is filed as Exhibit No. 2 with the plaintiff's bill, reads as follows:

"WAR DEPARTMENT, WASHINGTON, D. C.
April 22, 1912.

"TAKE NOTICE THAT—

"Whereas, The Old wharf of the Greenleaf-Johnson Lumber Company of Norfolk, Virginia, projecting into the southern branch of the Elizabeth River at a point opposite Dry Dock No. 3 of the Norfolk Navy Yard at Norfolk, Virginia, was placed in said river without authority of Congress; and a portion of the said wharf extends beyond the harbor line as re-established at this point by the Secretary of War June 12, 1911, and the wharf, in its present condition, is a menace to all vessels using the channel in its vicinity;

"And whereas, Congress by Act approved March 4, 1911, entitled 'An Act making appropriations for the naval service for the fiscal year ending June 30th, 1912, and for other purposes' (36 Stat., 1265, 1275), has authorized the widening of the channel of the river at the point where the said wharf is situated; *and the execution of the project so authorized by Congress* requires the removal of all that portion of said wharf extending beyond the said re-established harbor line—the portion of said wharf required to be removed measuring about 270 feet along the southerly side and about 122 feet along its northerly side, and including all that part of the wharf lying westerly of the harbor line as re-established June 12, 1911, as hereinbefore stated:

"Now, therefore, this is to certify that the Secretary of War, under authority of the Act of Congress, entitled, 'An Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes,' approved March 3, 1899 (30 Stat. 1121, (22) 1150), hereby notifies the said Greenleaf-Johnson Lumber Company that the portion of said wharf hereinbefore described as lying westerly of the said harbor line as re-established June 12, 1911, as hereinbefore stated, is regarded as a menace to navigation, and that unless the said The Greenleaf-Johnson Lumber Company shall remove the same within sixty days after the date of service of this notice, such portion of the said wharf as lies westerly of the said re-established harbor line will be removed by the United States in the prosecution of the work of improvement authorized by Congress as hereinbefore stated.

ROBERT SHAW OLIVER,
Asst. Secretary of War."

Thereupon this suit was instituted to enjoin and restrain the Secretary of War and the Assistant Secretary of War from attempting to put into effect the threatened action on the part of the Government to remove said wharf until compensation be made therefor pursuant to the requirements of the Fifth Amendment of the Constitution of the United States.

The District Court held that complainant's wharf and pier were its property which could not be taken for public use without compensation and entered a decree enjoining and restraining the defendants from removing the same as threatened in the notice of April 22, 1912. Upon an appeal

by the Government this decree was reversed, and from this action by the Circuit Court of Appeals this appeal is taken.

Before entering upon a discussion of the law by which this case is to be controlled, it may be well to notice an intimation made in argument in the court below that there is a distinction between the rights of an owner of a wharf, or pier, which was constructed prior to the establishment of harbor lines by State, or Federal, authority, although the wharf be still in use and be located within the limits of the subsequently established lines, and the rights of the owner of a wharf constructed immediately adjoining, after the establishment of such harbor lines.

We respectfully submit that the right of the riparian owner in such structures and in the right to maintain them after being constructed, is the same in either case and that the only purpose which the State, or Federal Government, has, in establishing such lines, is to limit the point to which such structures may thereafter be built or extended; and certainly it cannot be successfully contended that, where a structure has been so placed in a navigable stream, and afterwards habor lines are established which are outside of such structures, the rights of the owner can be any less complete than his rights would be, were he to construct the same after the establishment of such lines. What possible difference can there be in his rights in either case? If his wharf or pier is already there, and the harbor lines are thereafter established, it is a distinct recognition of the fact that it is within lawful bounds. What could he do to make his rights any more secure than he has already done? What act must he perform to bring about a positive recognition of its legality? Must he tear down his wharf just to have it rebuilt upon the same spot? The mere fact that the lines are run and he is shown to be within the

lawful territory assigned to riparian owners, is a distinct and complete recognition of the legality of the structure.

But in addition, it appears in this case that, after harbor lines had been established and the legality of his structure had thus been recognized, the State authorities by direct and affirmative action recognized the existence of the same as legal, and authorized the owner to repair and improve it. Certainly no wharf or pier maintained under these circumstances could have any more recognition by public authority than this one has had. The stability of property rights and of property acquired under authority from the State in aid of navigation, before Congress assumes control will presently be considered.

ASSIGNMENTS OF ERROR.

FIRST: The Circuit Court of Appeals erred in holding that the Secretary of War, under authority conferred by Section 11 of the River and Harbor Act of 1899, 30 St. at L., 1150-1151, had the authority or power under the facts stated in the bill and the exhibits filed therewith, and under the evidence introduced, to establish harbor lines and require the removal of complainant's wharves for the purposes shown by the said bill, exhibits and evidence.

SECOND: The said court erred in holding that under the provisions of said act the Secretary of War had authority to order the removal of the wharf used and occupied by the complainant, or to cause the same to be removed as indicated in the notice served upon complainant, said wharf having been constructed according to the harbor lines as then established and under express authority from the Government in the exercise of its power to regulate and control navigation.

THIRD: The said court erred in holding that the said wharf or pier of the complainant could be taken and destroyed, in the interest of navigation, without the payment of just compensation therefor, because by such action the complainant will be deprived of its property without due process of law, and its private property will be taken for public use without just compensation, contrary to the provisions of the Fifth Amendment of the Constitution of the United States.

I.

FIRST ASSIGNMENT OF ERROR.

As to the first assignment of error, we recognize the rule that the acts of public officers in the exercise of the discretion which the law confers upon them will not usually be reviewed by the courts, but this rule has its limitations. Mechem on Public Officers, sec. 513.

It is submitted that whenever the facts upon which that discretion is to be based are not controverted and are such as to leave no room for the exercise of discretion, and the absence of the right on the part of the officer to act is made manifest on the face of things, then his right to act becomes a matter of law and may be reviewed by the courts.

School of Magnetic Healing v. *McAnnulty*, 187 U. S. at pp. 107-109.

In *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, the court says, at page 623:

> "It has been held that the establishment of a *general system of harbor lines* for the protection of commerce and navigation is not of itself an injury to property and cannot be restrained, * * *

> but it has also been recognized that a different question arises when active measures are taken against an individual proprietor to maintain a location of limits in alleged violation of his private rights, and thus to prevent him from enjoying what is asserted to be a lawful use of his property."

Applying that rule to this case, the statute gives the Secretary of War jurisdiction to establish harbor lines only "where it is made manifest to the Secretary of War that the establishment of harbor lines is *essential to the preservation and protection of harbors.*" If the facts show beyond controversy that the establishment of harbor lines is not essential to the preservation and protection of harbors, then the Secretary of War is without authority to act, and if, as stated in *Philadelphia Co.* v. *Stimson, supra,* "active measures are taken against an individual proprietor to maintain a location of limits in alleged violation of his private rights, and thus to prevent him from enjoying what is asserted to be the lawful use of his property," his action may be inquired into by the courts, and if unlawful, restrained.

It will be observed that Congress has not declared that the widening of the channel of the Elizabeth River outside the navy yard was required for the needs of navigation and commerce, as it did with respect to St. Mary's River, as pointed out in the case of *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, and therefore in this case it is not conclusive that such action was required on the part of the Secretary of War. On the contrary, this entire record shows that the Navy Department has so appropriated the channel of the river for the private purposes of the government as to obstruct commerce and then called upon the War Department to take the adjacent property in order to

widen the channel, and thus indirectly permit the Government to convert the channel of the river into a storage basin for its vessels.

The evidence shows that if the position taken by the Government be sustained, its works at the Norfolk Navy Yard and its use and occupancy of the harbor in front of its property, as contemplated by the Secretary of War and the Navy Department, may and will be carried to the extent of obstructing commerce upon the river at that point, and the harbor will be so occupied as to interfere with navigation, and it is because of that fact, and on that account alone, that the contemplated action on the part of the Government, through the Secretary of War, is taken. This is shown by the very notice, filed as Exhibit No. 2 with the bill, which the Secretary of War gave to the Greenleaf-Johnson Lumber Company, requiring the removal of its property, in which it is expressly stated that "the execution of the project so authorized by Congress requires the removal" of the same; it is shown by the correspondence between the Navy Department and this company, as well as in the agreed statement of facts, found on pages 36 and 37 of the record, with the correspondence which follows, and it is further shown by the facts set out in the said agreed statement, found in the record on page 37, where it is expressly admitted that this work is being done pursuant to the act making appropriation for the naval service for the year ending June 30, 1912. (36 St. at L. 1265-1275.)

That such is the sole purpose of the change in the harbor lines and the required removal of the company's property is shown by the additional fact that it appears that the United States moors abreast its war vessels, colliers, and other vessels in front of its navy yard, so that they project out into the channel which it so uses for the storage of its

vessels. See testimony of Ira Johnson, page 45 of the record. It further appears that the width of 600 feet for the channel of the river is found to be ample for the purposes of navigation and commerce, both above and below the navy yard, and that all vessels, entering and departing from the port of Norfolk, have ample room; that commerce is fully provided for by a channel of that width, and that it is only widened to 866 feet immediately in front of the navy yard, where the operations of the Government are conducted, and where its vessels are stored. These facts make it manifest that it is not navigation and commerce which require this additional width, but the needs of the Government for its private purposes. If, as the record shows, these facts are incontrovertible, then we respectfully submit that the statutory authority and power of the Secretary of War becomes a matter of law for the determination of the courts, and not a question of mere discretion.

II.

Second Assignment of Error.

We respectfully submit that neither the act of March 4, 1911, making appropriation for the naval service for the year ending June 30, 1912, (36 St. at L., 1275) upon which the notice to complainant to remove its wharf, and threatening to remove the same upon its failure to do so, was based, as expressly stated in said notice, nor the act of March 3, 1899, (30 St. at L., 1121, 1153, 1154), under authority of which it is claimed that the Secretary of War has the right to order the removal of the complainant's property as an obstruction to navigation, confers any such power upon him.

The act of March 4, 1911, was simply an appropriation bill providing money for the improvement of the naval service at different points in the United States. It conferred no such rights as are sought to be asserted; it merely provided for the doing of that which the government had the right to do in the improvement of its own works, and on its face contemplates paying for such property as the use of the navy may require. There is no intimation anywhere in the act that it related to commerce, or the improvement of any harbors for the purposes of commerce; it was purely a naval bill providing money for naval purposes, and it gives the Secretary of War absolutely no powers whatever, nor did it contemplate any action whatever by him.

It is also manifest, from a reading of the act of March 3, 1899, that no authority is given to the Secretary of War to order the removal of an existing wharf lawfully established.

There is nothing inherent in the office of the Secretary of War, any more than there is in the office of the Postmaster-General, or the Secretary of the Interior, or in any other cabinet officer, which carries with it this right. His authority, therefore, must depend upon and be derived solely from statute, and such statute must be literally and strictly construed and followed in the exercise of the powers conferred.

Nothing is more definitely settled than the rule that statutory power conferred upon public officers is confined strictly to the terms of the statute itself, and such statutes are to be strictly construed when determining what these powers are. Mechem on Public Officers, secs. 507-511.

It was admitted in argument that section 19 of the act had no application. It was also conceded that section 18 applied only to *bridges*, and only gave the Secretary of War

authority to require bridges which have become an unreasonable obstruction to navigation to be altered so as to meet existing conditions. The only section upon which the Govment relied was section 11, which provides for the establishment of harbor lines, beyond which no piers, wharves, bulkheads, or other works shall be extended or deposits made, except under "such regulations as may be prescribed from time to time by him." But the Government claimed that the right of the Secretary of War to order the removal of complainant's pier and wharf was an incident to putting into effect the naval appropriation bill of March 4, 1911. It is manifest that the language used in section 11 of the act of March 3, 1899, refers to what may be taken *after* the establishment of these lines. The court has only to read the section, as a whole, to see that it has no reference to existing structures lawfully there. Hence it is that by special provision made in section 18 authority was given the Secretary of War to act with respect to bridges already in existence. We submit that if Congress had intended that this act should aply to piers, wharves and warehouses which had been constructed and maintained under legal authority, and had possessed the power to do so, it would have so provided in language which could not be questioned, either by including wharves, piers, etc., in section 18 along with bridges, or it would have said in section 11, "beyond which no piers, wharves, bulkheads, or other works, shall be extended *or maintained.*"

The Supreme Court of the United States in the case of *Prosser* v. *Northern Pacific R. Co.*, 152 U. S. 59, had this in mind when it said on page 64:

> "There can be no doubt that a State may, by its Legislature, or through a board of harbor commissioners, establish for the protection and benefit of

commerce and navigation, harbor lines in navigable waters, not inconsistent with any legislation of Congress, limiting the building of wharves and other structures *upon lands not already built upon.*" (Italics ours.)

See, also, syllabus in *Commonwealth* v. *Alger*, 7 Cush. 53.

These two cases had reference to harbor lines established under State authority, but there can be no difference of opinion, we believe, about the proposition that if, as we shall presently see, the State's authority is plenary with respect to navigation and navigable waters within its boundaries, property acquired under that authority is as stable, and rights with respect thereto are as complete and as fully protected by the fifth amendment of the Federal Constitution as if acquired under Federal authority, after Congress has assumed control. In either case that property is subject to the supreme right of the Government for public purposes, but entitled, of course, to the protection of the fifth amendment.

See, also, *Gring* v. *Ives*, 222 U. S. 365, 369.

It is therefore clear that there is nothing in the present Federal statute authorizing the Secretary of War to alter or remove a lawfully existing pier or other like structure which existed prior to the re-establishment of the harbor lines by him. All the court has to do is to examine the statute itself, and it will see that there is nothing in any of its provisions authorizing this action on the part of the Secretary of War.

The Government also took the position that this power in the Secretary of War was implied from the language of section 11. When the court realizes the extent of the power which would be thus conferred upon a single indi-

vidual—a power which authorizes him to order the removal of piers, warehouses, and other water front property of any kind in this country, without compensation being made therefor, and without inquiry by any tribunal as to the propriety thereof—it must be apparent that such authority, if within the power of Congress, not only should, but would, only be conferred in language too plain to admit of controversy, and would not be left to mere inference.

III.

Third Assignment of Error.

An examination of the cases involving the questions at issue here shows, that, in some of them, structures extending into navigable waters were held to be private property protected by the Fifth Amendment of the Federal Constitution, while in other cases like structures were held to be obstructions to navigation subject to removal without compensation. For example, in *Gibson* v. *United States*, 166 U. S. 269, and other similar cases, wharves and like structures were expressly recognized as being the property of the riparian owners, protected by the Fifth Amendment, this court holding that in those cases there had not been a *"taking"* thereof, but that mere incidental damage had resulted from the acts of the Government, for which payment was not required by the Constitution. In *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, certain structures which had been placed in the navigable waters of the Monongahela River were held to be the property of the riparian owners which was fully protected by the Fifth Amendment.

On the other hand, in the case of *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, a dam extending into St. Mary's River was held to be an obstruction to navigation

subject to removal by the Government without compensation therefor.

In determining what are the principles and considerations which should control the case at bar and to which of those classes of cases it belongs, it will be necessary to consider the principles which were applied in those cases, and to ascertain the distinguishing features which controlled the court in arriving at the respective decisions.

We submit that an examination of the cases referred to shows no conflict between them, but that they are in perfect harmony, and that unless this court should recede from the doctrines and rulings announced in the case of *Monongahela Nav. Co.* v. *United States,* it must necessarily reach a similar conclusion in the case at bar.

To arrive at a correct conclusion with respect to this assignment of error, we should look at the situation of the parties from the beginning and ascertain:

(1) What was the character of the title or ownership of the submerged soil below low water mark?

(2) What was the authority of the State with respect to the disposition thereof—that is, of the submerged soil?

(3) After the right to construct and maintain its wharf had been acquired by the plaintiff and that right had been exercised by the actual physical construction thereof, what was the character of that structure and of the owner's right therein? Was it property or was it not, and what were the rights acquired when so constructed under authority of law?

(4) Being thus legally constructed and maintained under State and Federal authority, what is the authority of the State or of Congress *now* with respect thereto?

In other words, what is meant by the expression so often used in the decisions of our courts, the "plenary authority

of the States" and the "paramount or supreme authority of Congress in respect to navigation"?

1.

THE CHARACTER OF THE TITLE AND OWNERSHIP OF THE STATE IN THE SUBMERGED SOIL.

In Virginia the title to the beds of its navigable waters below low water mark is in the State, not as owner but as the holder of the bare legal title in trust for the benefit of the riparian owners, in the enjoyment of their private rights as such, and also in trust for the paramount and superior rights of the public in the use of the stream.

The result is—

(1) If a riparian owner undertakes to exercise any of his rights as such without consulting the trustee, so to speak, that is without getting the permission of the State, whether it be to plant oysters, or to reach navigable water by a wharf, or pier, he does so at his risk, and the trustee may require the removal of either whenever in its judgment the higher trust under which the property is held demands it.

(2) If the trustee grants privileges in the exercise of the trust under which it holds title for the riparian owner *and not in the exercise of its higher duty as trustee for the benefit of the public,* the right or privilege thus granted is still subject to the dominant trust in favor of the public and must be accepted by the owner subject and in subordination thereto. In fact, the decisions to be presently referred to indicate that the trustee, whether acting under the direction of Congress or not, cannot by so doing affect its duty or its authority in the exercise of this dominant trust for the benefit of the public, and rights thus acquired must be subject thereto.

The cases of *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, and *Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82, present cases belonging to this class and are controlled by the principle just announced, as we will hereafter endeavor to show.

(3) But when rights are granted by the State or by Congress, and acted upon by the individual, and are so granted not merely under and in the exercise of the subordinate trust for the benefit of the riparian owner, but pursuant to and in the fulfilment of the primary and superior trust for the benefit of the public, then the rights thus acquired are not subject to any higher or dominant rights, but are held *under* the supreme authority of the trustee and are such as the State as well as Congress had the power and authority to confer and are *in fulfilment of the purposes of the dominant trust under which the title to the land is held, and hence are irrevocable.* Property thus acquired is subject to no higher authority except, like all other property, it is subject to the right eminent domain and may be taken for any public purposes, including navigation, upon compensation therefor.

This view of the rights of all concerned—individual and the public—is in harmony with all the decisions on this subject.

As we understand the decisions, there is no difference, from a practical standpoint, between the rights acquired by an individual, who owns the fee in the bed of the stream and constructs a wharf authorized by the State or by Congress, and his rights in the same property when constructed upon submerged soil the legal title to which is in the State, when in constructing or maintaining the same he acts under the permission or authority of the State or Federal Government. In other words, if he owns the fee, it is the bare legal title burdened with the public right, main-

tained and protected by State and Federal authority, to which any rights which he may have are subservient. On the other hand, if the fee is in the State, it is the naked legal title held in trust for the public and for the uses to which a riparian owner is entitled as such; one of which is the right to construct and maintain a pier upon the same, these rights being also subservient to the public use.

It is not a beneficial ownership in the State like that of its other lands, but a naked legal title held in trust for the enjoyment of certain rights belonging to the riparian owner and the public alike, in the fulfilment of which trust it so regulates the exercise of those rights that the enjoyment thereof by one will not interfere with the enjoyment thereof by the other. When the State authorizes a riparian owner to construct an improvement of this character it is not the grant of a new right, but simply the regulation of an existing property right already belonging to him which, when once exercised, cannot be taken away without compensation. It is a trusteeship for both the riparian owner and the public, and if the trustee in the execution of the dominant trust and acting within the scope of its authority invites the riparian owner to expend time, labor and money in constructing these improvements in aid of navigation and commerce, a *quasi* contract or agreement is the result, which is binding on the trustee and it is estopped to cancel or revoke the same. *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 335, as construed in *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82.

In the very act of authorizing and regulating these improvements the State acts, not for the benefit of the riparian owner alone, but as trustee in the interest of both. It is fulfilling its trust towards the public as well as the individual by promoting and enhancing facilities for navigation and commerce for the benefit of the public at large,

and is thus carrying out the purposes for which it holds title to the property for the *benefit of the public and the individual.*

To illustrate: A manufacturing company establishes a large plant on the shore of a navigable stream in Virginia. In order to deliver its wares and to receive its raw material and fuel, it constructs a pier to a point in the navigable water, established by State authority, to which it may go. Whether the State grants this authority by private act or general regulation, in so doing it fulfills the trust for which it holds title to the submerged land, not merely for the benefit of the riparian owner, but it fulfills that trust for the benefit of the public as well. So far as the wharf is in the interest of the riparian owner and for his benefit in receiving its material and delivering its goods, the State fulfills the trust for which it holds the land for his benefit. At the same time by securing the establishment of this improvement it furnishes facilities for the transportation of these goods into the general market, and at the same time establishes a means whereby others engaged in commercial enterprise can sell and deliver their merchandise to their customers, and to this extent enlarges and enhances commercial intercourse through this aid to navigation. As a matter of fact, commerce is kept alive by just such improvements and facilities as these, and thus the State by authorizing and regulating these improvements is carrying out the very trusts for which it holds title for the benefit of the public.

So when Congress assumes control, it too simply regulates the exercise of these recognized property rights for which the State holds the title to these submerged lands, in order to protect and promote interstate commerce—nothing more.

Hence it will be found from an examination of the cases presently to be cited that the rights of such owners are controlled and adjudicated by the same legal principles, whether the naked legal title to the land be in the State or in the individual.

In determining the character of the ownership of the soil and of the rights which are acquired therein under authority of the State, let it be borne in mind at the outset that the character of the ownership of the beds of the streams in the several States, and the rights acquired under authority thereof, are determined by the laws of those States as construed by their respective State courts, and their decisions control the Federal courts with respect thereto.

In 1st Farnham on Waters and Water Rights, page 50, it is said:

> "The extent to which the land under the waters passed to private holders of grants from the Government of land on the shores, is governed by the local law of the State. In the determination of this question the Federal courts are bound by local decisions."

1 Lewis Eminent Domain, sec. 76-b, uses this language:

> "76-b. THE QUESTION OF TITLE TO THE BED OF NAVIGABLE WATERS AND OF THE RIGHTS OF RIPARIAN OWNERS UPON SUCH WATERS IS ONE OF STATE POLICY AND STATE LAW.—It has been repeatedly held by the Supreme Court of the United States that it is *for each State to determine* whether the title to the bed of navigable waters is in the State or in the riparian owner, and to what extent the prerogative of the

> State shall be exerted over such waters and the lands under them. And so it is held, by the same high authority, *that each State may determine for itself what rights,* if any, attach to the ownership of lands adjacent to such waters. Upon these questions the Federal courts follow the decisions of the State courts." (Italics ours.)

Said Toulmin, Judge., in *Sullivan Timber Co.* v. *City of Mobile,* 110 Fed., at p. 190, in discussing this very subject:

> "The decisions of the highest court of a State in the construction of its laws, and in the determination of the rules of property therein, are of controlling authority in the Federal courts." (Citing a long list of Federal cases.)

Finally, the Supreme Court of the United States in *Shively* v. *Bowlby,* 152 U. S., at p. 40, announces this as the rule governing the decisions of the Federal courts with respect to this question, saying:

> "The later judgments of the court clearly establish that the title and rights of riparian or littoral proprietors in the soil below high water mark of navigable waters are governed by the local laws of the several States, subject, of course, to the rights granted to the United States by the Constitution."

In other words, the character of the property rights of riparian owners in Virginia is determined by the decisions of the Virginia courts, and if under those decisions these structures are the private property of the owner, then they are protected by the Federal Constitution.

Bearing this in mind, we find that the first inquiry as to the nature of the title of the State of Virginia in submerged lands is answered in sections 1338 and 1339 of the Code of Virginia, which are as follows:

> "Sec. 1338. BEDS OF BAYS, RIVERS AND CREEKS AND SHORES OF THE SEA, UNGRANTED, TO REMAIN IN COMMON.
>
> "All the beds of the bays, rivers, creeks, and the shores of the sea within the jurisdiction of this Commonwealth, and not conveyed by special grant or compact according to law, shall continue and remain the property of the Commonwealth of Virginia, and may be used as a common by all the people of the State for the purpose of fishing and fowling, and of taking and catching oysters and other shell fish, subject to the provisions of chapters ninety-five, ninety-six and ninety-seven, and any future laws that may be passed by the General Assembly; and no grant shall hereafter be issued by the register of the land office to pass any estate or interest of the Commonwealth in any natural oyster bed, rock, or shoal, whether the said bed, rock, or shoal shall ebb bare or not.
>
> "Sec. 1339. RIGHTS AND PRIVILEGES OF OWNERS TO EXTEND TO LOW WATER MARK.
>
> "Subject to the provisions of the preceding section, the limits or bounds of the several tracts of land lying on the said bays, rivers, creeks and shores, and the rights and privileges of the owners of such lands, shall extend to low water mark, but no farther, unless where a creek or river, or some

part thereof, is comprised within the limits of a lawful survey."

This title of the State to lands below low water mark is, however, not the absolute right with which it holds its waste high-lands, subject to grant. The State is a trustee for certain purposes. It is a trustee holding the naked legal title for the benefit of the people at large and for whatever particular benefits the adjacent riparian owner is entitled to enjoy by reason of his more favored position through the occupancy of the adjacent land. One of these rights, for the enjoyment of which these submerged lands are held by the State, is the right to build and maintain a wharf over and upon the submerged soil out to navigable water, subject to such regulations and restrictions as the State in the exercise of its trusteeship for the benefit of the public may deem necessary to prescribe.

As said in *Stockton* v. *Baltimore & N. W. R. R. Co.*, 32 Fed., bottom of page 19:

> "The said lands were held by the State, as they were by the king, *in trust* for the public uses of navigation and fishery, and the erection thereon of wharves, piers, light-houses, beacons, and other facilities of navigation and commerce. Being subject to this trust, they were *publici juris;* in other words, they were held for the use of the people at large." (Italics as in the text.)

In *Shively* v. *Bowlby, supra,* the court said on pages 46-7:

> "In the yet more recent case of *Illinois Central Railroad* v. *Illinois* (1892), which also arose in Illinois, it was recognized as the settled law of this country that the ownership of and dominion and

> sovereignty over lands covered by tide waters, or navigable lakes, within the limits of the several States, belong to the respective States within which they are found, *with the consequent right to use or dispose of any portion thereof*, when that can be done without substantial impairment of the interest of the public in such waters, and subject to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce. 146 U. S. 387, 435-437, 465, 474."

And on page 19, referring to the title held by the State in these submerged lands:

> "But this title is subject to the public rights of navigation and fishery; and therefore, *so long as the flats have not been built upon or enclosed*, those public rights are not restricted or abridged; and the State, in the exercise of its sovereign power of police for the protection of harbors and the promotion of commerce, may, without making compensation to the owners of the flats, establish harbor lines over those flats, beyond which wharves shall not *thereafter* be built, even when they would be no actual injury to navigation." (Italics ours.) But note the condition *"so long as the flats have not been built upon or enclosed."*

The right and title of the State in these lands is thus clearly and succinctly described by Chief Justice Shaw in *Commonwealth* v. *Alger*, 7 Cush., at p. 83:

> "Supposing, then, that the Commonwealth does hold all the power which exists anywhere, to regu-

late and dispose of the seashores, and tide waters, and all lands under them, and all public rights connected with them, whether this power be traced to the right of property or right of sovereignty as its principal source, it *must be regarded as held in trust for the best interest of the public, for commerce and navigation, and for all the legitimate and appropriate uses to which it may be made subservient.*" (Italics ours.)

But the highest tribunal of our own State which, under the authorities cited, is the final arbiter of this question, has settled it in the case of *Taylor* v. *Commonwealth*, 102 Va. 759. At page 768, in referring to the opinion of the Supreme Court of the United States in the case of *Illinois Central R. R. Co.* v. *Illinois*, 146 U. S. 387, Keith, President, says:

"As to the character of the title held by the State, he concludes that *it is different from that which States hold in lands intended for sale.* 'It is a title held *in trust* for the people of the State, *that they may enjoy the navigation of the waters, carry on commerce over them*, and have liberty of fishing therein, freed from the obstruction and interference of private parties. *The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands;* and so long as their disposition is made for such purposes, no valid objections can be made to the grants. *It is grants of parcels of lands under navigable waters, that may afford foundations for*

wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and water remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State." (Italics ours.)

Again, on page 770, the Virginia court says:

"In *Shively* v. *Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331, this subject was further discussed by Mr. Justice Gray, who delivered the opinion, in which many authorities are considered, and the conclusion reached that the lands under tide waters are vested in the States *for the benefit of the whole people,* within their respective borders, subject to the rights surrendered by the Constitution to the United States. See, also, *Alger* v. *Commonwealth,* 7 Cush. 53; *Florida* v. *Black River Phosphate Co.,* 32 Fla. 82, 13 South. 640, 21 L. R. A. 189; *Gough* v. *Bell,* 21 N. J. L. 156; *Langdon* v. *New York,* 93 N. Y. 129; *Pollard* v. *Hogan,* 3 How.. 212, 11 L. Ed. 565.

"The authorities which we have cited abundantly establish the proposition asserted by the court in *McCready* v. *Commonwealth, supra,* that the navigable waters and the soil under them, within the territorial limits of a State, are the property of the State, to be controlled by the State, in its own discretion, *for the benefit of the people of the State,* and demonstrate that, section 1338 of the Code is a declaration of right in the State, sanctioned and

supported by the common law. See, also, *French* v. *Bankhead*, 11 Gratt. 136."

And at page 771 the same court says:

> "The fee simple title, therefore, of a riparian owner ends with low water mark. *Between that point* and the line of navigability the *riparian owner has a qualified right*, of which Justice Miller, in *Yates* v. *Milwaukee*, 10 Wall. U. S. R. 447, 19 L. Ed. 984, speaks as follows: *'But whether the title of the owner of such a lot extends beyond the dry land or not*, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigagable stream; and among those rights are access to the navigable part of the river from the front of his lot, *the right to make a landing wharf or pier, for his own use, or for the use of the public*, subject to such general rules and regulations as the Legislature may see proper to impose for the protection of the rights of the public, whatever those may be. *This riparian right is property, and is valuable*, and though it must be enjoyed in due subjection to the rights of the public, *it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested*, the owner can only be deprived in accordance with established law, and, *if necessary, that it be taken for the public good upon due compensation.*" (Italics ours.)

So that the doctrine of *Yates* v. *Milwaukee*, 10 Wall. 497, is expressly adopted in this State, where the riparian proprietor *owns only to low water mark*, and the right of access to the navigable portions of the stream and to build and maintain wharves and piers thereto, whatever that

right is (for it may be limited and regulated by the State in the interest of navigation), *is property.*

If that be so, what must be the character of the actual structures and of the right to maintain them after that right has been exercised? This, however, is a subject for discussion when that question is presently considered.

Continuing, the Virginia Court says (p. 772):

> "Lewis on Eminent Domain, section 78, after stating the opinion of those writers and judges who maintain that *the riparian owner has no private rights which are appurtenant to his land other than those of any other member of the public,* and that the only difference is that he is more conveniently situated to enjoy the privileges which all the public have in common, and that he has access to the waters over his own land, which the public has not, says, 'there are cases which hold that the riparian owners upon waters, the bed of which belongs to the public, *have valuable rights* appurtenant to their estates, *of which they cannot be deprived without compensation. This seems to us the better and sounder rule.* The opposite conclusion has been reached by a narrow and technical course of reasoning, based upon the fact that the *title to the soil is in the State, or the public.* It is assumed that this title gives the State the same absolute and exclusive control of the waters and their bed as an individual possesses over his private property. *But there is really no analogy between the relations of a riparian owner to the waters upon which he abuts* and the relations between the proprietors of adjoining lands. *The State holds the title to public waters as a trustee merely for the use of all the public in*

> *common.* The very object in declaring the title in the public is the better to secure this common use and benefit. * * * It is more reasonable, more logical and more just to say that these privileges *are in fact* rights, as inviolable as *the soil itself.* The public loses nothing, for it is conceded that all these rights are subject to the paramount right of the State to use and improve the waters as shall best subserve the common rights of all." (Italics ours.)

If, however, any doubt existed as to the law prevailing in this State, that doubt has been set at rest by the very recent case of *Grinnell* v. *Daniels*, 110 Va. 874, 877, wherein the court again expressly recognized the doctrine announced in *Yates* v. *Milwaukee*, 10 Wall. 497; *Taylor* v. *Commonwealth*, 102 Va. 759; and *Norfolk City* v. *Cook* (erroneously written Yates), 27 Gratt. 430, 435.

Hence, under the decisions of the highest court of this State, we find that the title of Virginia, in the submerged lands under tide water, is that of a trustee for the purposes which we have indicated, one of which is the right to construct and maintain a wharf subject to such permissions and regulations as the State may grant and prescribe. This right to so use these lands is secured to the riparian holder, and the land is held by the State for his benefit, all of which is declared to be a substantial property right, the extent of which, and the right to enjoy which, is limited and rendered uncertain only by reason and to the extent of the right of the State or of Congress, as the case may be, to regulate its use and enjoyment within constitutional limitations, one of which is that it cannot be taken without compensation.

2 and 3.

THE AUTHORITY OF THE STATE AS TO THE DISPOSITION OF SUBMERGED LANDS AND THE CHARACTER OF OWNERSHIP WHICH IS ACQUIRED UNDER GRANTS OF RIGHTS AND PRIVILEGES FROM THE STATE OR FROM CONGRESS.

2. The second inquiry to be considered is, holding the character of title which it does—that is, as trustee for riparian owners and the public—what is the authority of the State with respect to the bed of the stream, and how far may it grant and regulate the use thereof; and what is the character of the property which the riparian owner acquires when, under express authority, he exercises the privileges granted him by the State, or the Government, in the execution of that trust?

The character of its ownership indicates the nature of its right to grant and regulate the enjoyment of the uses for which the State holds these lands in trust. It is manifest that it may regulate and limit, according to its discretion, the enjoyment of these riparian rights, in the interest of navigation, for the benefit of which it holds title to these lands. It may permit the enjoyment of these individual private rights, subject to such limitations and regulations as may be deemed expedient for the protection of rights to be enjoyed under the dominant trust for the benefit of the public; or it may grant, limit and regulate the same by general statutory provisions establishing harbor lines, bulkhead lines, regulating the character of the structures to be erected, and the like. In all such matters the State's powers are as full, complete and extensive as those of any sovereign, until Congress chooses to supersede them and assume control. The authorities presently to be cited, bearing upon the right of the Government, either State or Fed-

eral, to take such property in the interest of navigation, fully sustain this statement of the law. Yet these are not the granting of any right; on the contrary, they are simply the regulation of existing property rights, for which, in the interest of the public, the property is held in trust by the State.

Nor does it make any difference whether the naked legal title to the submerged soil be in a riparian owner or in the State. If in the owner, the State has the power to control its use in the interest of navigation and the public; if it is in State, yet it is in trust that he shall have the very same use thereof, subject to the very same regulation and control, which right, when exercised, is declared by the courts to be property in the fullest sense.

3. The power of the State being unlimited, the next inquiry is this: After a State has given to a riparian owner the authority to construct a pier of given character and dimensions, at a given place, and to a given point, and where it has been constructed under authority of law, and especially where the State has, as was done in this case, recognized the legality thereof, and authorized its improvement, the Federal Government having up to that time exercised no authority whatever, what is the nature and character of that structure and the right to maintain it? Is it property or is it not? What are the rights acquired under such authority after the privileges thus acquired have been exercised?

And this is the crucial test of the plaintiff's right in this case, because if its pier and wharf and basin, and the right to maintain the same, are its private property, then that property is protected by the Fifth Amendment of the Constitution.

That provision contains no exception, and there is no limit upon the scope of its application. It says that private

property shall not be taken for public purposes without just compensation. It does not say, except that Congress may take private property extending into navigable streams without compensation, nor that Congress may revoke a grant or license made by a State under which such private property has been acquired. This provision being absolute, and without limitation or exception, we submit that neither Congress nor the courts can prescribe a limitation or exception to its operation. If this be property then, for whatever purposes the Government may seek to take it; it presents a case of taking private property without compensation, not authorized by the Fifth Amendment of the Constitution.

Of course, until the authority of the State is obtained, these rights are more or less inchoate, and are subject to the authority of the State as trustee to exercise the trust under which it is held for the benefit of the public, subject, of course, to the control of Congress, which has the general authority to regulate in the interest of navigation and commerce. But when the Government, State or Federal, in carrying out the purposes of the dominant trust under which its title is held for the benefit of the public, as well as the trust for the benefit of the individual, invites the erection of such structures, makes provisions under which they may be lawfully constructed and enjoyed, either by general law or by statute, prescribes a place where they may be put, or, if already constructed, recognizes the legality of their existence, and declares that the right to them shall be in the owner, and that when so built they shall not be deemed to interfere with navigation, and especially when, after they are already constructed, it recognizes the legality thereof, then they are not only property, but property as lawfully held and owned as the highland adjacent thereto, and no provision or exception is

found in the Constitution which authorizes the taking thereof without compensation, any more than it authorizes the taking of any other property.

As we enter the harbor of Norfolk and see the superb coal piers of the Virginian and Norfolk and Western Railways, built of steel, costing millions of dollars, and constructed under direct authority of the Government, both State and Federal, and from which hundreds of thousands of tons of coal are shipped to all parts of the globe, or as we enter New York harbor, with its miles of waterfront, from which mammoth piers extend hundreds of feet into the river, constructed pursuant to authority granted by law, and through which so much of the commerce of the world is transported, and without which commerce and navigation could not be carried on, all bearing a market price and value and bearing their proportionate part of the burdens of taxation, can it be questioned that not only are the structures themselves property, but when constructed, the right to maintain them there is equally property, protected by the Constitution?

But let us see how these structures are regarded by the highest courts of the land, both State and Federal.

In the first place, the laws of the State of Virginia seem to settle this question and fix the policy of this State, which, as we have seen, is the rule of property governing this case.

Prescribing the powers of the board of harbor commissioners for this port, sections 2010 and 2011 of the Code of Virginia are as follows:

> "Sec. 2010. *Jurisdiction of Board.*—The jurisdiction of said board for the purposes of this chapter shall extend to the Elizabeth river and all the branches and tributaries thereof along the water front of the cities of Norfolk and Portsmouth and

Norfolk county. They shall have power to fix, regulate and define the lines along said river and the branches and tributaries thereof within which riparian owners may erect wharves, piers, docks, and other proper structures and fixtures for commercial and manufacturing purposes: provided, that whenever any harbor lines have been or may be hereafter established under authority of Congress by any proper officer of the United States in any of said waters, the power herein conferred upon the said board of harbor commissioners shall only be exercised within the lines so established, but they may regulate such structures as may be erected and prevent all encroachments upon said lines.

"Sec. 2011. *Board may prescribe limits to wharves, docks, &c., and remove obstructions to navigation.*—They shall have authority to cause the removal of any wharf, dock, wreck, or other obstruction to navigation or that may in their opinion be injurious to the harbor or that may cause shoaling at any point in the channel of said river, its branches or tributaries, at the expense of the owner or party causing the obstruction: *provided, the rights of any owner of a wharf whose lines have been heretofore fixed by authority of law shall in no way be disturbed.*" (Italics ours.)

Thus, the State prescribes the method by which the right to erect and maintain these structures may receive the sanction of the law and have the legality thereof recognized and established; and in conferring authority to remove docks and wharves which may, in their opinion, be injurious to navigation, it expressly provides that docks and wharves which have been built under authority of law,

shall in no way be disturbed. In the enactment of this statute the State was executing the dominant trust in the interest of the public for whose benefit the submerged soil is held, and it must follow that rights acquired thereunder are subject to no higher authority than that to which all other property is subject when needed for public use.

In 1 Farnham on Waters and Water Rights, page 136, it is said:

> "The right of an individual to use a waterway for the purpose of navigation comes to him *as one of the public*, and he has no more rights than belong to the public in the use of a public highway, unless he is a riparian owner on the stream, *when his rights may depend on different principles.* Waterways constituting the highways lie along land the title to which is usually in private individuals, and in many instances the individuals have the title to the bed over which the water flows. This contiguity to the water gives certain rights which belong to the owner of the land as an individual, *and not as one of the public.* With these rights the public cannot interfere. *They are private property within the protection of the constitutional provisions against taking property for public use without compensation.*" (Italics ours.)

On pages 510 and 511:

> "If the line is not fixed until after wharves have been erected it cannot be drawn so as to destroy a portion of them without making compensation to the owner. The line cannot be fixed for an ulterior purpose. The *mere fixing of a harbor line confers*

no title on the riparian owner to the soil between the shore and the line so fixed; but the *effect of the establishment of such line* is generally held to be to permit the *riparian owner to project his wharves or piers to it,* or even to make a solid filling of earth to that point if consistent with the custom in force in the locality; and the one making such improvements *is also held to acquire the title to them.*"

And on pages 551-2:

"A wharf which has been erected for the convenience of commerce under the express or tacit permission of the State, by a riparian proprietor, *is private property of which he cannot be deprived without compensation,* and, as such, is subject to taxation; and equity will protect him from its removal as an illegal obstruction."

And on page 569:

"A wharf may be entirely private, entirely public, or private affected with a public interest. In case a riparian owner erects a wharf or projects a pier into the water entirely for his own use, *he has as much control over it as he has over other portions of his property.*" (Italics ours.)

In *Sullivan Timber Co.* v. *Mobile,* 110 Fed. 194:

"Such rights of the riparian owner having been acquired by usage, and their existence being thus recognized by the State and by the city of Mobile, are a valuable property, and cannot be arbitrarily

or capriciously destroyed or impaired, though they must be enjoyed subject to such general rules and regulations as the legislature may prescribe for the protection of the rights of the public in the navigation of the river. *Yates* v. *City of Milwaukee, supra; Weber* v. *Commissioners, supra; Illinois Cent. R. Co.* v. *Illinois*, 146 U. S. 445, 13 Sup. Ct. 110, 36 L. ed. 1018."

And on pages 195-196:

"While this legislation and the acts of the State and the city thereunder were not a grant, they, in my opinion, implied a license to complainant and other persons similarly situated to construct or extend a wharf or other structure into the channel of Mobile river, provided it be done in conformity with such legislation and the rules and regulations prescribed by authority of the State. There was no license expressly granted, but it was clearly implied. There was conferred on the licensee *no estate or title in the shore or soil under the river over which such structures were to be constructed*, but a privilege or license was given to be exercised in conformity with certain rules and regulations to be prescribed therefor. 'A license, in the law of real estate, is an authority to do an act or a series of acts on the land of the person granting the license, without conferring on the licensee any estate in the land.' And a license may be implied from the acts of the parties. 2 Am. & Eng. Enc. Law (2d ed.) 1132. 'The right to wharf out may rest upon passive or implied license merely.' *Cohn* v. *Boom Co.*, 47 Wis. 314, 2 N. W. 546; *Diedrich* v. *Railway*

Co., 42 Wis. 262; 2 Am. & Eng. Enc. Law (2d ed.), *supra*. At common law an owner of land fronting on a navigable river has a right of access to the navigable part of the river, but if he erects a wharf or other building, *without license*, below high-water mark, where the soil is the king's, it may, at the suit of the king, be demolished or seized. Yet such owner may acquire the right to erect a wharf or other building by charter or grant or license, and also by prescription or usage. *Shively* v. *Bowlby*, *supra*, and authorities therein cited. Here, as I have said, the legal title *to the shore or soil below high-water mark is in the State*, or in the city of Mobile by grant of the State. As already said, there is in this State no positive law or judicial rule prescribing the nature and extent of the riparian rights of owners of land on tide water within the limits of the city of Mobile, but that it is common knowledge that such owners have by long usage been accorded and have exercised the right to build wharves and other structures upon the flats or shore lands in front of their uplands, and out of the navigable part of the Mobile River. The exercise of such right is not prohibited by any law of the State. It may reasonably be presumed that the legislature of Alabama, recognizing the fact that such owners have by long usage, 'if not from the earliest settlement of the country,' claimed and exercised the right to construct wharves, landings and other structures in front of their upland out to the navigable part of the river, enacted the legislation we have been considering for the purpose of protecting the public easement or servitude in the navigation of the river. That legislation, as we have seen, provides that it

shall be unlawful to construct such wharves or other structures unless it be done in conformity with the rules and regulations prescribed by the State or under its authority. *It seems to me clear that, when the State of Alabama and the city of Mobile concur in saying to any person who proposes to build or extend a wharf or other structure into the channel of Mobile river that it shall be unlawful for him to do so unless he conforms to certain rules and regulations,* they virtually say to him, if he constructs his said structures in conformity with such rules and regulations, it shall be lawful for him to do so.

It is alleged in the bill that complainant constructed the wharf and other structures on the land involved in the ejectment suits under and by virtue of the invitation and license of the State of Alabama and of the city of Mobile, and that they were constructed in strict conformity with the State and city legislation on the subject, and with the rules and regulations thereunder prescribed. This license did not vest any right *until exercised,* and could only be exercised by one possessing riparian rights; *but when executed* it was a lawful exercise of a privilege or license, *which became irrevocable,* and especially where expenditures were made in reliance upon the license, as is alleged in the bill. 2 Am. & Eng. Enc. Law (2d Ed.) 1145; *Rhodes* v. *Otis,* 33 Ala., 578; *Shively* v. *Bowlby, supra.*" (Italics ours.)

As already pointed out, the doctrine of *Yates* v. *Milwaukee* has been recognized and accepted in Virginia, where the owner of the land holds title *only to low-water*

mark, this state holding that the mere right of the riparian owner to build a wharf is property, which cannot be taken without compensation, that right of course being subject to State and Congressional regulation in the enjoyment thereof, and the same cannot be taken without compensation. This being the law in Virginia *a fortiori*, is it true after that right has been consummated by the erection of the wharf.

In *Horner* v. *Pleasants*, 7 Atl. 692, the Maryland Court of Appeals, said:

> "This is a purely statutory grant, and one that the State was fully competent to make. As said in *Chase's case*, 43 Md. 23, the right of the lot holders to make these improvements in the water is a franchise or vested right peculiar in its nature, *but a quasi property*. This statutory franchise was an incident or appurtenance to the lots fronting on the water. It was the object of the State to hold out inducements to such lot owners to make these improvements for the benefit of the trade and commerce of the city. When made, they were declared to be the right of such improvers forever. In order to effect this object, it was not necessary to grant a technical fee in the land covered by the water. But the State did grant a perpetual use of such land for the purpose of erecting and keeping up these wharves, and this valuable license or franchise, *as long as used, she can no more annul than she could a patent in fee.*" (Italics ours.)

Cases without number from the various State courts construing the property rights within their respective jurisdictions may be cited, all of which hold that wharves

when erected under State authority are the private property of the owner, *whether the fee in the submerged soil be in the State or in the owner of the adjacent land;* that these structures pass by deed, descent and inheritance and bear the burden of taxation as all other private property.

The federal courts are equally uniform in so holding.

We ask the special attention of the court to the fact that of all the cases cited by the attorneys on each side of this controversy, not one can be found which holds that such structures, when constructed, under State or Federal authority, in the interest of navigation and for the mutual benefit of the individual and the public, are not the private property of the individual. The question in each and all of them has always been, *has there been a taking of that property* in the particular case then being considered?

Only one case need be cited at this point to show what the opinion of the Supreme Court of the United States is as to wharves built into the navigable waters of Virginia.

In the case of *Weems Steamboat Co.* v. *People's Company*, 214 U. S. 345, this court considered the question as to what the rights of an owner of a private wharf extended into navigable waters were, *how far they were private property*, and how far the government in the interest of navigation *could impress them with a public use*, and instead of holding, as contended by the Government, that, having been built upon lands to which the owners had no title, the property was not private in its character, the court said:

> "The rights of a riparian owner upon a navigable stream in this country are governed by the law of the state in which the stream is situated. These rights are subject to the paramount public right of navigation. The riparian proprietors have

the right, among other things, to build wharves out so as to reach the navigable waters of the stream.
• • •

"The courts of the State of Virginia affirm the same rights of the riparian proprietor. If the wharf obstructs navigation or the private rights of others, or if it encroach upon any public landing, the wharf may be abated. Code of Virginia, 1887, section 998. The private wharf on a navigable stream is *thus held to be property which cannot be destroyed*, and it is property of the exclusive use of which the owner can only be deprived in accordance with established law, and if necessary, that any part of it be taken for the public use, *compensation must be made.* The owner of a private wharf on a navigable stream *does not on that account hold it by a different title from the owner of any other property* which he may use himself or permit others whom he may select to use, while at the same time denying its use by anyone else." (Italics ours.)

Remembering that the right to take private property for public uses extends to the taking of private wharves and using them as public wharves in the interest of commerce just as those same piers can be taken away to make room for commerce, that case is an authority directly in point. The government had the very same authority to take those wharves and use them in the interest of commerce which it had to take them away and destroy them in the interest of navigation, which is but a branch of commerce, and yet it is distinctly declared that the private wharf on a navigable stream in Virginia is property which cannot be destroyed, property of the exclusive use of

which the owner can only be deprived in accordance with established law, and if necessary that any part of it be taken for public use, compensation must be made.

Remembering that the federal courts follow the decisions of the State courts on these questions, we have a direct adjudication by the Supreme Court of the United States of the character of such property held in Virginia as well as the right of the Federal Government to interfere with its use in the interest of interstate commerce. The cases presently to be cited in connection with the next inquiry also fully sustain our position.

4.

THE AUTHORITY OF CONGRESS NOW TO TAKE SUCH PROPERTY WHEN ACQUIRED AND CONSTRUCTED UNDER THE AUTHORITY OF THE STATE OR OF CONGRESS GRANTED IN THE INTEREST OF NAVIGATION.

These structures and the right to maintain them being beyond question the private property of the owner thereof, the next inquiry is, what are *the rights of either the state or Federal Government with respect thereto?* Can a State take them in the exercise of its power to regulate and promote commerce within its borders, or can Congress take them in the exercise of its constitutional authority to regulate commerce with foreign nations and among the several states? Inasmuch as the right of the States, as well as of Congress, in this respect (so far as the question now being considered goes) depends upon the application of the fifth amendment of the Federal Constitution, the decisions of the highest judicial tribunal of the land, and to which we must look for the highest authority on that subject, are, with one or two exceptions, all which we need examine.

And just here we again emphasize the point that nowhere is any exception made to the protection of private property, whatever may be its character, against a taking for public use without compensation. If it is property, it is protected, whatever may be its nature, or the purposes for which the government proposes to take it.

Some of the cases to which we will refer involve rights acquired under state authority, while others involve similar rights acquired under federal authority. Some of them involve riparian rights where the legal title to the submerged land is in the State, while others involve similar rights where the legal title to the land is in the individual. Yet, in each and all of them, such structures when lawfully built under the authority of either government are recognized as property which cannot be taken without compensation.

When these cases are considered, it will be found that so long as its authority is not interfered with by Congress the power of the State over all of its navigable waters is plenary—that is to say, the State in the exercise of its sovereign right with respect thereto stands as any independent sovereignty: its powers are absolute and unlimited, except so far as it is restrained by constitutional limitations. There is nothing which Congress can do or require which the State cannot do or require.

The fact is, the rights of Congress are only those which have been granted it by the States through the Federal Constitution. The States certainly did not confer upon Congress through the Federal Constitution greater powers than they themselves had as independent sovereignties. The extent of the powers conferred upon Congress in respect to commerce was this: Whenever Congress shall deem it best it may step in and take charge, it may assume all the functions and authority *which the State possessed,*

and may supersede the rights and functions of the State whenever interstate commerce is involved. That is the meaning of the language so often used by the courts when they say the authority of Congress is paramount, or that the power of the States is plenary, subject only to the supreme authority of Congress. Nowhere will it be found that a court has held that the scope of a State's jurisdiction and authority over navigable waters is any more limited in its extent, or any less broad in its scope, when she is left to the exercise thereof, than are those of Congress when it takes charge and assumes control. She can regulate the exercise of every riparian right just as Congress can do. She can remove obstructions to the free navigation of her waters just as Congress can do. She can grant every right which Congress can grant, and she can legislate in the interest of navigation exactly as Congress can legislate. The only difference is that when Congress assumes to act the State cannot conflict with, or supersede what Congress does; and that is what is meant by the paramount or supreme authority of Congress,—nothing more. Until Congress acts the authority of the State is plenary,—that is, it is full and complete—after Congress acts its authority is as full and complete as was that of the state. In other words, Congress steps into the shoes of the State and takes charge where she left off.

But this does not mean that when Congress assumes to exercise the authority conferred upon it, everything which the State has done is, *ipso facto*, undone and annulled, and all individual rights granted or acquired under the authority of the State Government are, *ipso facto*, destroyed. Of course, Congress can undo, in a sense, what the State has done—*so could the State*—while she exercised the functions and prerogatives of State sovereignty. The State, subject to constitutional limitations and restrictions, *can*

undo that which she has done and take away that which she has granted, but in so doing she is limited by the constitutional provision that private property thus granted by her, or lawfully acquired by the individual, cannot be taken away in the interest of commerce, which is a public use, without compensation. No case in all the many decisions, State and Federal, can be found which holds that a wharf or other like tangible property thus acquired by an individual under authority lawfully granted by a State, in the interest of navigation, can be taken away *by the State* without just compensation. Then, upon what principle can Congress take away that same property, lawfully acquired either under State or Congressional authority? The restrictions imposed upon Congress when it assumes to exercise its authority over interstate commerce are exactly the same as are those imposed upon the State when she is in control. Congress can no more destroy rights and take property acquired under State authority than it can destroy rights and take property acquired under its own authority. Either Government, when lawfully exercising the functions belonging to it in regulating commerce, may take *anything which it deems necessary to that end, subject to the limitations imposed by the Constitution,* one of which is that private property cannot be taken for public use without just compensation, and nowhere will it be found that private property, lawfully acquired under State authority, *is any less property or any less protected as such,* than similar property acquired under similar authority conferred by Congress.

On the contrary, there can be no difference of opinion, we imagine, about the proposition that if the State's authority is plenary with respect to navigation and navigable waters within its boundaries, property acquired under that authority is as stable and rights with respect thereto are

as complete and fully protected by the fifth amendment of the Federal Constitution as if acquired under Federal authority after Congress has assumed control. In either case that property is subject to the supreme right of the Government to take the same for public purposes upon making just compensation for the same.

The decisions presently to be cited will sustain the position we take, that there is no difference in the operation of the fifth amendment in protecting property thus acquired and held by individuals, whether under State or Federal authority, from its protection of property regularly acquired by grant from the State. These structures when built and maintained according to State or Federal regulation are recognized and regarded as being *in the interest and in furtherance of commerce*, as promoting the general welfare of the country, rather than as burdens upon or hindrances to navigation and commerce; it is recognized that without such facilities commercial intercourse with foreign countries and between the States could not be maintained. Hence, it is the recognized policy of both State and Federal Governments to promote and encourage their use and maintenance. Such action is the most usual illustration of the exercise of the dominant trust by the trustee, and is the most potent and beneficial exercise thereof. Surely the establishment of such improvements to navigation and aids to commerce, and the protection of property rights therein, so as to encourage their construction by riparian owners, are no less the exercise of this trust than the mere removal of obstructions would be.

Recognizing this, and for the promotion of the very purposes for which it holds the land in trust, viz., the advancement of commerce and navigation and to facilitate the enjoyment of the use of these navigable waters by the public to the fullest extent, the Governments, State and Federal,

say to riparian owners: "If you will contribute the labor and material for these improvements, these aids to commercial intercourse, you may use the land for that purpose to the line which I have established. These structures shall be your private property, and if ever the needs of commerce require us to take it away it shall be treated as any of your other property needed for public use." In other words, the State is putting into effect the purposes for which it holds title to this land both for the riparian owner and the public, and such treatment of the owner is required by the Constitution. Such property is nowhere excepted from its protection.

To illustrate: A owns a bar running out 200 feet to port warden's line. His land is acquired by grant. It is above low-water mark. He builds a pier and warehouse out to port warden's line on this property belonging to him.

B owns the water front adjoining that of A, but it does not extend as far into the river. In consideration that he will build a similar wharf and warehouse the State grants him leave to build out to port warden's line, and he does so.

It is not denied that A's property is protected as such by the Constitution. Why should there be any difference between the rights of these two property-holders, both of whose property is acquired from the State, when in the interest of commerce both must be removed so as to widen the channel at that place? Why should the Government in taking one be required to pay for it and allowed to take the other without compensation? The point we make is, that having exercised these rights granted under the authority of the State, in the exercise of the highest trust, indeed in the exercise of the entire trust for the benefit of the individual as well as the public, which is therefore of no less binding force than a grant by the State, such prop-

erty is protected, as all other property is, from being taken for public use without just compensation. That property acquired in the exercise of these rights in submerged lands, thus held by the State *in trust for the enjoyment thereof by riparian owners*, and the public when lawfully exercised, is tangible property, in which the property rights of the owners are as stable and as complete and are as fully protected by the Constitution *as are rights* in land held by direct grant from the State, *all being alike subject to the right of the Government to take private property for public use after making just compensation therefor.*

But it is suggested in opposition to this position that rights thus acquired are but a license, or leave, granted by the State—merely a permission, *subject to revocation by Congress* in the interest of commerce.

If this were true, why would it not be equally true of the State while exercising the authority and functions of a sovereign State—we mean, of course, before and until her rights have been superseded by Congress? If such be the character of the privilege conferred by her, then in the exercise of her powers, which are plenary, she may, until Congress acts, likewise revoke that right, and under the theory advanced by our opponents all property thus acquired would cease to be property whenever she chooses to revoke her grant of such authority, and no compensation could be asked or required.

In this connection may we ask: If it be true that the right and authority to construct and maintain these wharves are in the exercise of the dominant trust for which the beds of the streams are held and such action is not only within the authority of the Government, State or Federal, but is in the exercise of its absolute power of regulation, upon what principle can it be said that the trustee may revoke at will rights which have thus been granted

and may take and destroy property thus acquired through the exercise by the Government of its admitted authority, without compensation being made therefor, in the absence of stipulation reserving the right of revocation? If these structures are built, and the right to maintain them acquired *through the very act of regulating commerce by the Government,* upon what principle is the power of revocation *by mere implication* based?

The language of the court in *Sullivan Timber Co.* v. *Mobile,* 110 Fed. 195, from which we have already quoted, fully meets this argument.

In a well considered case by the Supreme Court of Oregon, this question is raised and discussed. It is the case of *Lewis* v. *The City of Portland,* 35 Pac. 256, in which C. H. Lewis and others instituted a suit to enjoin the city of Portland from appropriating to public use without compensation a certain strip of land belonging to the plaintiffs.

Chief Justice Lord states the facts as follows:

> "This is a suit in equity to enjoin the defendants from appropriating to public use a certain strip of land for a bridge abutment and approach thereto without compensation to its owners. The complaint, *inter alia,* alleges that the plaintiffs are the owners in fee-simple and in possession of the lots therein described, having adjacent thereto several warehouses; and also of a strip of land at the foot of Burnside Street, 60 feet wide, between Front Street and the Williamette river, and of the wharf located thereon, extending to navigable water of such river; that the defendants, the bridge commission, appointed and acting under the "Meussdorffer Act," propose to construct a bridge across the Wil-

liamette river from the intersection of Burnside and North Front streets, in the city of Portland, to a point opposite thereto on the east bank of said river, and have let the contract therefor to the defendant, the Bullen Bridge Company, which company is about to commence the work of its construction; that the defendants propose to place the approach to and abutment for the west end of such bridge upon said strip of land, and to appropriate the same to public use, without any compensation to its owners, and without taking any steps to acquire the title, or any right to occupy or use said land; and that, unless restrained, they will proceed with the construction of said bridge, and wholly deprive the plaintiffs of their property without compensation therefor, and also permanently obstruct the use of said wharf, and the extensions thereof north and south of the proposed site of said bridge, to their great and irreparable injury."

The State of Oregan had passed an act giving riparian owners the right to build wharves into her navigable streams. She, *the State, owned the soil below high water-mark.* The right was conferred on the city of Portland to define and regulate the extent and character of such wharves in its harbor, and all of the questions now before this court were considered by the Supreme Court of that State, among them this question as to the power of the State to revoke and annul the right and franchise thus granted, and to take or destroy property thus acquired without compensation. On this subject the court said:

"But it is argued that the leave granted under the statute, being merely a permission or license,

is revocable at the pleasure of the State; and that, as a consequence, the wharf of the plaintiff ceases to be a legal structure, or to have a legal existence, when the leave is withdrawn, or the license revoked. The statute has not been repealed, either directly or by implication, and, so far as it is concerned, there is no revocation of the license granted. The most that has been claimed for the Meussdorffer Act in that connection is that it—being for a public purpose—operates to revoke the license of the plaintiffs, and thereby to deprive their wharf of its legal foundation and existence. It will be observed, then, that the argument is based on the theory that the permission granted by the statute to build wharves *is merely a license, and as such, may be revoked at the pleasure of the State,* after it has been acted upon, and the wharf erected. But this is not so. As was said in *Bowlby* v. *Shively, supra,* the statute does *not vest any right until exercised.* It is a license revocable at the pleasure of the Legislature *until acted upon and availed of.* It is doubtless true that, if the statute should be repealed, or the adjacent tide lands disposed of, the privilege given the upland owner to build a wharf across the tide lands into deep water, *unless acted upon or availed of,* would be revoked. But the riparian owners who have taken advantage of the permission or privilege to build wharves—especially those on fresh navigable waters, for the reasons suggested—have acquired rights that would not be affected by the repeal of the statute. *These wharves are legal structures, and as such are private property, which cannot be taken without due process of law, and due compensation therefor.*

Hence the contention of the defendants that the Meussdorffer Act—which authorizes the location and construction of the Burnside street bridge, and under which they are proceeding to build it—is a revocation of the leave or license, cannot be maintained. Nor do we find anything in the case of *Illinois Cent. R. Co.* v. *Illinois, supra,* in conflict with this result. There the grant of the submerged soil of the lake was in such quantity as, in the opinion of the court, impaired the public interest in its waters, and operated, if irrepealable, *as an abdication by the State of its trust over the property.* The right of a riparian owner to build a wharf over the submerged soil of a river to navigable water is not inconsistent with the public interest, nor in prejudice of the public rights. Nor does the grant of such subjacent soil or tide lands subject to the paramount right of navigation and commerce authorize its use for any purpose inconsistent with the public interest. The land in front of the riparian owner, when used for a wharf, and under proper regulation, *is in aid of navigation, and for the benefit of commerce.* Of course, the State has the right to regulate the building of wharves, or to determine how far rights in submerged soil can be exercised consistently with the easement of navigation. Our State has made such regulations, and, as there is no claim that the wharf of the plaintiffs impedes navigation, or is not erected in conformity with its requirements, it must be regarded as a legal structure, and entitled to be protected as private property. Although the evidence shows that the original wharf was torn down and rebuilt in the year 1876, in conformity with the ordinance, we have

not deemed it necessary to refer to that fact as strengthening the right of the plaintiffs in the premises. Within the principle and for the reasons suggested, it is apparent that the cases of *Rundle* v. *Canal Co.*, 14 How. 80; *Navigation Co.* v. *Coons*, 6 Watts & S. 101; *Canal Co.* v. *Wright*, 9 Watts & S. 9—do not determine the questions involved in the case at bar. The right to build and maintain a wharf, being in aid of navigation, and for the benefit of commerce, rests on a different footing and principle than a license to erect mills with dams which may impede or obstruct navigation or canals diverting the waters of a navigable river.

"Without further reference, it is sufficient to say that we think the plaintiffs have a right of property in their wharf of which they cannot be deprived except in accordance with established law, and, if it should be necessary that it should be taken or destroyed for the use of the bridge, that it cannot be done without due compensation therefor. *Monongahela Nav. Co.* v. *U. S.*, 13 Sup. Ct. 622." (Italics ours).

Any other construction of the rights of riparian owners, and any other policy with respect to navigation and the enjoyment thereof by the public, would render property of this character so unstable and investments therein so uncertain as to hinder and destroy commerce rather than promote it.

Upon what principle can it be said that a different right exists in Congress simply because it supersedes the State in the exercise of these identical functions and prerogatives?

But, let us examine some of the cases decided by the Supreme Court of the United States bearing upon this subject. The full and complete authority of the State Government with respect to navigation until Congress chooses to act, is recognized in all of the decisions upon this subject which have been referred to by counsel for appellant and counsel for the Government, and in the cases of *Montgomery* v. *Portland*, 190 U. S., at p. 104, *Cummings* v. *Chicago*, 188 U. S. 427, and *Lake Shore* v. *Ohio*, 165 U. S., 365, 366, the Supreme Court of the United States has held that even since the passage by Congress of Acts regulating commerce, it was not intended to entirely supersede that control, but that the States might still exercise their control, and might regulate matters of navigation within their borders, along with the Federal Government, so long as their action did not conflict with that of the Federal Government.

If this be true, then we repeat that property acquired under State authority prior to action by Congress is as fully protected by the Constitution as is any other property. The Federal Constitution provides that private property shall not be *taken* for public use without just compensation, but it makes no provision for consequential damages. This provision was originally contained in the Constitutions of the several States, but the courts having drawn the distinction between the actual taking or physical destruction of property and the consequential damages which might result to property from an act which did not constitute actual taking, led most of the States to change their Constitutions so as to provide not only for the taking, but also for the damaging of property. But this change has not yet been made in the Federal Constitution, and the result is that all of the cases bearing upon this subject, including the cases in which the power of Congress to

order changes to be made in bridges over navigable streams was upheld, recognized that these improvements are the private property of the individual, and the only matter of inquiry was whether or not the action of the Government in the respective cases amounted to the *"taking"* thereof. Every one of these cases held in express terms that these improvements, and the right to maintain them, *were property* and that they could not be *"taken"* without compensation, and the sole question for decision was, whether in the given case *that property had been taken.*

In the case of *Weems Steamboat Co.* v. *People's Co.*, 214 U. S. 345, this Court considered the question as to what the rights of the owner of a private wharf extending into navigable waters were, how far they were private property, and how far the Government in the interest of navigation could impress them with a public use, and instead of holding, as contended by the Government, that having been built upon land to which the owner had no title, the property was not private in its character, the court said:

> "The rights of riparian owner upon a navigable stream in this country are governed by the law of the State in which the stream is situated. These rights are subject to the paramount public right of navigation. The riparian proprietors have the right, among other things, to build wharves out so as to reach the navigable waters of the stream * * *
>
> "The courts of the State of Virginia affirm the same rights of the riparian proprietor. If the wharf obstructs navigation or the private rights of others, or if it encroach upon any public landing, the wharf may be abated. Code of Virginia 1887, section 998. The private wharf on a navigable

stream is thus held to be property which cannot be *destroyed* or its value impaired, and it is property the exclusive use of which the owner can only be deprived in accordance with established law, and if necessary that any part of it be taken for the public use compensation must be made. The owner of a private wharf on a navigable stream *does not on that account hold it by a different title from the owner of any other property* which he may use himself or permit others whom he may select to use, while at the same time denying its use by any one else." (Italics ours.)

In the case of *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, which has been so often recognized and followed in later decisions, it was held:

(1) That the State had full and complete power to act with respect to her navigable waters until Congress acted, p. 335.

(2) That a like, though express, power exists in Congress, subject to the fifth amendment of the Constitution, p. 335-7 and 341.

(3) That not only were the dam and lock which had been constructed in navigable water private property, but the franchise to enjoy tolls therefrom was likewise property, fixing the value of the tangible property itself, and that neither could be taken without compensation, 343-4.

(4) That vested rights were acquired when the State or Federal Government acted and gave the authority under which that property was acquired, p. 332-5. Counsel in that case made the very point now contended for by the Government, namely, that the Government had the right to take the entire property without compensation on the ground that it was put in a navigable stream and was

put there subject to this paramount right of the Government, but that court at page 341 says, in answer to that position:

> "The theory of the Government seems to be that the right of the navigation company to have its property in the river and the franchises given by the State to take tolls for the use thereof, are conditional only, and that whenever the Government in the exercise of its supreme power, assumes the control of the river *it destroys both the right of the company to have its property there,* and the franchise to take tolls. But this is a misconception. The franchise is a vested right. The *State has power to grant it.* It may take it as it may take other private property, for public uses upon the payment of just compensation. *A like, though superior power,* exists in the National Government. It may take it for public purposes, and take it even against the will of the State; but it can no more take the franchise *which the State has given* than it can any private property belonging to an individual." (Italics ours.)

The same court on page 336, after quoting from a number of cases, says:

> "It cannot be doubted in view of the long list of authorities—for many more might be cited—that Congress has the power in its discretion to compel the removal of this lock and dam as obstructions to the navigation of the river, or to condemn and take them for the purpose of promoting its navigability. In other words, it is within the competency of Con-

gress to make such improvements respecting the improvements of the Monongahela river as in its judgment the public interests demands. Its dominion is supreme.

"But, like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, *and among them is that of the fifth amendment*, we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this fifth amendment and can take only upon payment of just compensation." (Italics ours.)

Now, here was a case in which a dam and lock had been built upon submerged lands in a navigable stream. The Attorney-General had asserted the right of the Government to take that property without paying for it on the ground that it had been put there subject to this supreme authority of the Federal Government with respect to navigation. That it was not such property as required compensation for the taking of it. If the Attorney-General in that case had been right, in the position that, having been built upon submerged lands owned by the State, it was not private property which is protected by the fifth amendment, why did not the court in that case and in the many other cases in which the right to compensation for such property was demanded, put at rest this question by holding that it was not such property as is protected by the Fifth Amendment, and that the Government had the right to take it without paying for it, instead of entering into the many long opinions which we find in the various cases

struggling with the question, not as to whether these improvements were or were not property, but whether or not there had been a "taking" of them.

In the Monongahela Navigation Company case it was expressly recognized that these structures built upon these submerged lands were property which had to be paid for even though taken in the interest of navigation.

In the case of *Gibson* v. *U. S.*, 166 U. S. 269, it appeared that Mrs. Gibson owned a tract of land upon an island in the Ohio river, from which was extended a landing used by her in shipping products from her farm. The Government constructed a dike in front of it which practically destroyed her access to it. The court recognized the property rights of the plaintiff in both the land and the landing, but held that the construction of the dike amounted to no taking of her property in any sense, but that she was simply suffering from consequential damages not protected by the fifth amendment.

In the case of *Scranton* v. *Wheeler*, 179 U. S. 141, the doctrine of *Monongahela Navigation Co.* v. *U. S.* was expressly recognized and approved. That was a case in which the Government built a pier in front of the plaintiff's wharf but no portion of it was taken. The Supreme Court expressly declared it to be property which was protected by the fifth amendment, but held that no part of it had been taken by the Federal Government.

This case went up from the Supreme Court of Appeals of Michigan after having first been heard and decided in the Circuit Court of Appeals and afterwards remanded to the State court for trial.

In the Circuit Court of Appeals, 57 Fed. Rep., p. 803, Judge Lurton delivered the opinion of the court. His opinion is quoted at much length by Mr. Justice Harlan in his

statement of the case, in which he says of Judge Lurton's opinion:

> "In a very able opinion delivered by Judge Lurton the facts are clearly stated, the authorities cited, and we think the conclusion there reached is the correct one."

Thus the language quoted from Judge Lurton's opinion is adopted as the opinion of the Supreme Court.

As to the rights of the parties when the title to the soil is in the riparian owner, and when it is in the State, he says, on page 145:

> "The right of Congress to regulate commerce, and, as an incident, navigation, *remains unaffected* by the question as to whether the title to the soil submerged is in the State or is in the owner of the shores."

Referring to the rights of the riparian owner before and after constructing his pier, he says:

> "A distinction exists between those cases where, under authority of the State, *a structure has been placed in a navigable stream*, such as a bridge, or lock and dam, as an improvement to the navigation of a stream wholly within its borders, and which is sought to be removed under the authority of subsequent Congressional legislation. In such case, the improvement, *being by authority of law*, can only be taken for public uses upon just compensation. This is the doctrine of the case of *Monongahela Navigation Co.* v. *United States*, 148 U. S.

312. In that case it was held that not only the actual property of the owner in the structure, but his franchise also, must be paid for. The plaintiff in the case before us has made no improvements for either public or private uses. No property of his has been invaded, none has been taken." (Meaning, that no pier had been built where the Government had erected its pier). (Italics ours.)

In the opinion of the Supreme Court (in *Scranton* v. *Wheeler*) at page 155, it is said:

"In *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 341, 343, there was an actual taking of certain locks and dams which had been constructed and maintained, under competent authority, by a navigation company, and the question was whether the franchise to take tolls for the use of the locks was to be deemed a part of the property taken for which compensation must be made. This court held that it was, remarking: 'The franchise is a vested right. The State has power to grant it. It may retake it, as it may take other private property, for public uses, upon the payment of just compensation. A like, though a superior, power exists in the National Government. It may take it for public purposes, and take it even against the will of the State; but it can no more take the franchise which the State has given than it can any private property belonging to an individual."

Again on page 158 referring to the case of *Yates* v. *Milwaukee*, 10 Wall. 497, the court said:

> "The decision in *Yates* v. *Milwaukee* cannot be regarded as an adjudication upon the particular point involved in the present case. That, as we have seen, was a case in which the riparian owner had in conformity with law erected a wharf in front of his upland in order to have access to navigable water. The city of Milwaukee attempted arbitrarily and capriciously to destroy or remove the wharf that had lawfully come into existence and was not shown, in any appropriate mode, to have been an obstruction to navigation. It was a case in which a municipal corporation intended the actual destruction of *tangible property* belonging to a riparian owner and lawfully used by him in reaching navigable water, and not, like this, a case of the exercise in a proper manner of an admitted governmental power resulting *indirectly* or *incidentally* in the loss of the citizen's right of access to navigation—*a right never exercised by him in the construction of a wharf before the improvement in question was made by the Government.*" (Italics ours.)

During argument in the lower court it was suggested by the district attorney that in *Yates* v. *Milwaukee*, a riparian proprietor owned the bed of the stream and suggested that in this respect there might be a distinction between that case and this. But it will be observed that that case is cited as authority in the Virginia case of *Taylor* v. *Commonwealth*, 107 Va., and by the Supreme Court of the United States in this case of *Scranton* v. *Wheeler*, in both

of which cases the State owned the bed of the stream; and both courts recognize that old case as authority, not because of any ownership of the soil (because Judge Lurton, whose opinion was adopted by the Supreme Court, had expressly declared that that consideration was immaterial), but because of the property rights which had been acquired by the exercise of the authority granted by the State to construct the wharf.

But, we are not left to our own construction of these various cases, or as to their meaning and effect.

In the case of *U. S.* v. *Lynah*, 188 U. S. 445, the Supreme Court of the United States first announces the doctrine that it has never held that private property of any kind may under any circumstances be taken for public use without compensation and takes up each of the cases which up to that time had been decided and shows that they all involve the question, not as to whether this or that was property protected by the fifth amendment, but whether or not the act of the Government amounted *to a taking of that property.* In that case the same position was taken which the Government takes in this, namely, that Congress under the supreme authority given it in the interest of navigation, can take this property, and that it was held subject to that right.

On this subject, the court says, page 471:

> "Passing to the third question, it is contended that what was done by the Government was done in improving the navigability of a navigable river, that it is given by the Constitution full control over such improvements, and that if in doing any work therefor injury results to riparian proprietors it is an injury which is purely consequential, and for which the Government is not liable. But if any

one proposition can be considered as settled by the decisions of this court, *it is that although in the discharge of its duties the Government may appropriate property*, it cannot do so without being liable to the obligation cast by the fifth amendment of paying just compensation.

In *Monongahela Navigation Company* v. *United States*, 148 U. S. 312, 336, it was said:

'But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation.'

In that case Congress had passed an act for condemning what was known as 'the upper lock and dam of the Monongahela Navigation Company,' and provided 'that in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls should not be considered or estimated,' but we held that this proviso was beyond the power of Congress; that it could not appropriate the property of the navigation company without paying its full value, and that a part of that value consisted in the franchise to take tolls. So in the recent case of *Scranton* v. *Wheeler*, 179 U. S. 141, 153, we repeated the proposition in these words:

'Undoubtedly compensation must be made or secured to the owner when that which is done is to

be regarded as a taking of private property for public use within the meaning of the Fifth Amendment of the Constitution; *and of course in its exercise of the power to regulate commerce, Congress may not override the provision that just compensation must be made when private property is taken for public use.'*

It is true that a majority of the court held, in that case, that the destruction of access to land abutting on a navigable river by the construction by Congress of a pier on the submerged lands in front of the upland, was not a taking of private property for public uses, but only an instance of consequential injury to the property of the riparian owner. *But the right to compensation in case of a taking was conceded.* There have been many cases in which a distinction has been drawn between the taking of property for public uses and a consequential injury to such property, by reason of some public work." (Italics ours.)

The court then takes up a number of cases, distinguishes them and points out that in each of them the question was whether the property had been taken, and not whether it could be taken without compensation.

In *Prosser* v. *Northern Pacific R. R. Co.*, 152 U. S. at page 64, the Supreme Court is careful to say with respect to the right of a State to establish harbor lines:

"There can be no doubt that a State may, by its Legislature, or through a board of harbor commissioners, establish, for the protection and benefit of commerce and navigation, harbor lines in navigable waters, not inconsistent with any legislation of Con-

gress, *limiting the building of wharves and other structures upon lands not already built upon.*" (Italics ours.)

Thus recognizing the right of owners of established wharves to be protected in the ownership thereof as property.

The case of *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, recognized every principle for which we contend. There the Secretary of War had re-established harbor lines in the harbor of Pittsburg, and the question raised was as to the rights of the parties by reason of a gradual change in the bed of the stream. No structures of any kind were taken or affected.

On page 623, the Supreme Court said:

> "It has been held that the establishment of a general system of harbor lines, for the protection of commerce and navigation, is not of itself an injury to property and cannot be restrained. *Yesler* v. *Washington Harbor Line Commissioners*, 146 U. S. 646, 656; *Prosser* v. *Northern Pacific R. R. Co.*, 152 U. S. 59, 64, 65. But it has also been recognized that a different question arises when active measures are taken against an individual proprietor to maintain a location of limits in alleged violation of his private rights and thus to prevent him from enjoying what is asserted to be the lawful use of his property. *Prosser* v. *Northern Pacific R. R. Co., supra.*"

And on page 629:

> "From these and other cases, it will appear that the absolute title of the riparian proprietor extends *to high-water mark only*, and that between ordinary high and ordinary low-water mark, his title to the soil is qualified, it being subject to the public rights of navigation over it, and of improvement of the stream as a highway. He cannot occupy to the prejudice of navigation or cause obstructions to be placed upon the shore between these lines *without express authority of the State.*"

On page 631, quoting from *Bailey* v. *Miltenberger*, 7 Casey 37:

> "It was not the purpose of the commissioners to transfer titles, but to mark the boundaries of riparian rights, so as to make them certain and permanent in their extent. So it was not the intention of the framers of the act of 1858 to pass title to lands, or to ascertain boundaries between individuals; but it was their purpose to regulate the right of navigation along the shores of these rivers by establishing high—and low-water lines, which would definitely ascertain and fix the extent to which the *right could be exercised;* and the extent to which the owners of the land *could exercise their own rights under the law of the State.*"

The court is then careful to point out on page 633 that:

> "When the Secretary of War, in 1895, fixed harbor lines he dealt with the stream as it then existed.

Whatever right the owner of the island may have had under the State law to reclaim the submerged land within the former line of high water, *had not been exercised.* The bill, in alleging that the new harbor line ran across the complainant's land, *must be taken to refer to the submerged land already described.* This is the import of its allegations and is shown by the record of the War Department annexed to the bill. In establishing this line, the Secretary of War followed quite closely the actual line of high water as it existed in 1895, except in the back channel of Brunot's Island where it ran several hundred feet outside the then high-water mark. The change of the harbor line at this point, in 1907, was for the purpose of making the line coincide with the actual high-water mark and in the report of the United States engineer who advised the change it was said that the lines as previously established had *'not been filled out to, and the riverbed on the Brunot Island side, and in the bend referred to' was in 'essentially the same condition as at the time the harbor lines of* 1895 *were fixed. * * *'*

"The location of the proposed harbor lines recommended in this communication is within the bed of the stream as it exists as a physical fact." (Italics ours.)

The court then proceeds to consider the power of Congress to protect and further navigation and commerce, quoting from some of the cases already cited by us as distinguishing between a taking of and incidental injury to property, saying in its quotation from the opinion of the Supreme Court in *Gibson* v. *United States,* 166 U. S. 269:

> "The Fifth Amendment to the Constitution of the United States provides that private property shall not 'be taken for public use without just compensation.' Here, however, the damage of which Mrs. Gibson complained was not the result of the *taking* of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental consequence of the lawful and proper exercise of a Governmental power."

And then quoting from the opinion of that court in *Union Bridge Co.* v. *United States*, 204 U. S. 364, says:

> "It is for Congress to determine when it will exert its power to regulate interstate commerce. Its mere silence or inaction when individuals or corporations, under the authority of a State, place unreasonable obstructions in the waterways of the United States, cannot have the effect to cast upon the Government an obligation not to exert its constitutional power to regulate interstate commerce *except subject to the condition that compensation be made or secured to the individuals or corporations who may be incidentally affected by the exercise of such power.*" (Italics ours.)

In that case the court emphasizes the fact that the engineer in charge had stated that the lines as previously established, *had not been filled out to* and the bed of the river was in essentially the same condition as at the time the harbor lines in 1895 were fixed. Hence that court was dealing, not with a case of the taking of an established wharf or pier, but with the right of the Government to prevent the building of a pier on what was held in that

case to be submerged lands not owned by a riparian owner. And in its opinion the rights of such property owners as the complainant, are expressly recognized as being protected by the Constitution.

These cases fully meet the suggestion that there may be a distinction between the rights of a riparian owner when a fee in the submerged soil is in him, and a case in which the fee is in the State, and hold that the ownership of the naked legal title to the submerged land is immaterial. The right of the Government is the same over submerged lands under navigable streams, whether the title be in the State or in the individual. In either case the State or Congress can prohibit its use for structures when the needs of commerce so require, or can use the soil for purposes of navigation if it is needed for those purposes.

If the title is in the owner it is a naked legal title burdened with the public right of navigation and the right of the Government to regulate its use for the protection and promotion of commerce.

If, on the other hand, the legal title is in the State, that title is one of trust for the public and for the enjoyment of such rights as the riparian owners have as such. In other words, wherever the legal title may be, *the beneficial ownership* is the same and the governmental authority is the same. But when, in the lawful exercise of that trust, the State authorizes permanent tangible property to be constructed in the interest of navigation, that property is protected by the Constitution as is all other private property, whether acquired by public authority, or through a grant from the State.

As said by Judge Lurton in *Scranton* v. *Wheeler*, to which we have referred, in 57 Fed., at page 812:

> "But, while the plaintiff under the law of Michigan is seized of the legal title to the soil under the

water, yet, in the very nature of the property such seizure is of the bare technical title."

Then after discussing the Constitutional powers of Congress with reference to such lands, he says:

> "The right of Congress to regulate commerce, and as an incident, navigation, *remains unaffected by the question as to whether the title to the soil submerged is in the State, or is in the owner of the shores.* A distinction must be recognized between that which is *jus privitum*, and that which is *jus publicum.*" (Italics ours.)

In other words, the right of a riparian owner in and to piers and wharves constructed under State or Federal authority, in no way depends upon the character of the ownership of the submerged land upon which it is built, or whether the title thereto is in the State or in him. His rights and his property in and to these improvements are the same whether the title to the submerged land be in the one or in the other.

Then after a discussion of the right of Congress to regulate navigation in the interest of commerce, having just held the ownership of the legal title to be immaterial, he says, page 814:

> "A distinction exists between those cases where, under authority of the State, a structure has been placed in a navigable stream, such as a bridge, or lock and dam, as an improvement to the navigation of a stream wholly within its borders, and which is sought to be removed under authority of subsequent congressional legislation. In such case, the

> improvement, being by authority of law, can only be taken for *public uses upon just compensation.* This is the doctrine of the case of *Monongahela Navigation Co.* v. *U. S.*, 148 U. S. 312, 13 Sup. Ct. Rep. 622. In that case it was held that not only the actual property of the owner in the structure, but his franchise also, must be paid for." (Italics ours.)

The weight to which this case is entitled as authority will be recognized when it is noted that circuit judges, Taft and Lurton, sat in the case, the opinion being prepared by Judge Lurton, and expressly approved and adopted by the Supreme Court of the United States, Justice Harlan rendering the opinion of the court.

The cases from which we have quoted make it manifest that there are circumstances and conditions under which riparian proprietors may construct wharves and piers and other like structures for purposes, and in aid, of commerce and navigation, and acquire property rights therein which are protected by the Fifth Amendment, for example the cases of *Shively* v. *Bowlby, Weems Steamboat Co.* v. *Peoples Company, Gibson* v. *United States, Scranton* v. *Wheeler, Monongahela Navigation Co.* v. *United States,* and others.

If this be true, what is it that takes the case at bar from the operation of the principles applied in those cases? Here is presented a case in which, not only is the structure within the lines established by both State and Federal authority to which such structures are invited, but the State of Virginia in 1883, when she was exercising full and plenary authority over the navigable waters of Norfolk harbor, *granted* to the appellant *by express and affirmative action,* the right to build and improve this wharf out to the established harbor line; and under and pursuant to this express

grant, it was constructed by appellant at heavy expense to to its present dimensions. This is alleged in the bill and not denied (record page 3), and also appears in the statement of facts found in record page 36. There is, therefore, here presented a case in which a wharf and pier were constructed and are maintained by the owner in aid of navigation and for the purposes of commerce, under the general invitation and grant of right by the State through the establishment of lines to which riparian owners were invited to build, as well as *by a direct and affirmative grant* of the specific right to construct this particular pier to the then established line; and its legality was thereafter recognized when the Secretary of War in 1899 established the same line for the Federal Government.

It follows that if, as we have endeavored to show, rights acquired under State authority are recognized as being held under valid grants of property rights, these structures built by appellant are, under the authority of those cases, protected by the Fifth Amendment of the Constitution.

So it can be said in this case, as was said in *Monongahela Navigation Co.* v. *United States, supra:*

> "This is something more than the mere recognition of an existing fact; it is an invitation to the company to do the work, and when, in pursuance of that invitation, and under authority given by the State of Pennsylvania, the company has constructed the lock and dam, *it does not lie in the power of the State or the United States to say that such lock and dam are an obstruction and wrongfully there, or that the right to compensation for the use of this improvement by the public does not belong to its owner, the navigation company.*" (Italics ours.)

And the principles and considerations which controlled this court in that case are equally controlling here.

Therefore, before the position taken by the Government in this case can be sustained, viz: that the grants of these rights by the State or Federal Government are mere revocable licenses and that these improvements to navigation are subject to the authority of Congress to order their destruction or removal at any time without compensation, the doctrines and principles which were applied in each of the cases from which we have just quoted must necessarily be rejected and overruled, and new principles and new rules under which property rights can be acquired must be promulgated, and the result must be that no property rights have been or can be acquired in improvements to navigation, such as were the subject of these suits, which are protected by the Constitution, and those cases are no longer to be followed by the courts.

It follows that whatever may be the title and ownership of the submerged lands and the rights of riparian owners with respect thereto, after such structures as these have been built under lawful authority derived from the Government, State or Federal, they, as to the right to maintain them there, become private property, which having been constructed under authority of law, can, as, stated by Judge Lurton, "only be taken for public uses upon just compensation," nothing being found in the Constitution excepting such property from its operation and protection.

In the light of the foregoing authorities, it seems clear that the title to the soil under navigable waters in Virginia is in the State of Virginia. That it is held by the State merely as trustee for the benefit of the riparian owners as individuals, as well as the public. That the trust in favor of the public is the dominant or superior trust, subject and subordinate to which is the trust in which the

bed of the stream is held for the benefit of individuals. That the rights of individuals which are enjoyed under that trust are twofold, namely, those rights which do not relate to navigation in any sense, and second, those which do relate thereto, and which contribute to the enjoyment thereof. It is also made clear that while the riparian owner may, and often does, exercise these rights and privileges as such, he does so without the sanction of the trustee and does so at his risk.

If he seeks the authority and permission of the trustee to exercise rights which are in no sense related to navigation or the public use, that permission, when obtained, is subject to the right and duty of the trustee to withdraw or regulate the same whenever the public needs require it. This rests upon the theory that his rights thus acquired are subject to the dominant and higher trust for the benefit of the public for which the submerged lands are held by the State, and it is beyond the power of the State or Congress to grant privileges which may injuriously affect the dominant trust under which the property is held for the benefit of the public.

Upon this principle, it was held in the case of *Illinois Central R. R. Co.* v. *Illinois*, 146 U. S. 387, that the State of Illinois had not the right to grant certain submerged land adjacent to the city of Chicago, so as to exclude its right to regulate commerce, holding that such grant would be deemed an abdication by the State of its trust over the property, and therefore outside of its authority as trustee, and that such a grant to the riparian owner would be subject to the public interest, notwithstanding the fact that it had been done by the State or Federal Government, and would therefore be revocable at any time.

That case, however, made it clear that when grants of rights or privileges are made within the authority of the

State, property acquired thereunder become as stable as any other property, and the rights and privileges so granted are irrevocable, and if taken for public use, it must be upon the payment of just compensation. On page *455* the court says:

> "The trust with which they are held, therefore, is governmental and cannot be alienated, except in those *instances mentioned of parcels used in the improvement of the interests thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.*" (Italics ours.)

The two cases of *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, and *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82, which seem to have controlled the decision of the Circuit Court of Appeals in this case (in fact, the opinion, in effect, says so), are examples of this class of cases. The grants under which the riparian owner in each of these cases acquired the privileges which they enjoyed, had no reference whatever to, or bearing upon navigation or other public interests, and therefore, they were not made in the performance of the dominant trust for the benefit of the public. They were exclusively in the interest of the individual riparian owners, and were not conferred in aid of navigation. Under the authorities to which we have referred, they were accepted and enjoyed subject to the higher rights of the public for whose benefit the bed of the stream was held.

In the last named case this principle is clearly and distinctly recognized and acted upon. In the opinion of the court, which was written by Mr. Justice Lurton, referring to the case of *Brown* v. *United States*, 81 Fed. 55, and

Richardson v. *United States*, 100 Fed. 714, which had been cited in support of the right to compensation for oyster beds taken or injured, he says on page 87:

> "That case and the later one cited fail to recognize the qualified nature of the title which a private owner may have in the lands lying under navigable waters. If the public right of navigation is the dominant right and if, as must be the case, the title of the owner of the bed of navigable waters is held subject absolutely to the public right of navigation, this dominant right must include the right to use the bed of the water for every purpose which is in aid of navigation. This right to control, improve and regulate the navigation of such waters is one of the greatest of the power delegated to the United States by the power to regulate commerce. Whatever power the several States had before the Union was formed, over the navigable waters within their several jurisdictions, has been delegated to the Congress, in which, therefore, is centered all of the governmental power over the subject, restricted only by such limitations as are found in other clauses of the Constitution.
>
> "By necessary implication from the dominant right of navigation, title to such submerged lands is acquired and held subject to the power of Congress to deepen the water over such lands or to use them for any structure which the interest of navigation, in its judgment, may require. The plaintiff in error has, therefore, no such private property right which, when taken, or incidentally destroyed by the dredging of a deep water channel across it,

entitles him to demand compensation as a condition."

So in the case of *United States* v. *Chandler-Dunbar Co., supra*, in which compensation was claimed for a dam which had been constructed for the purpose of turning a running stream into the fore-bay of the company. In that case the dam which was constructed was not intended or used in aid of navigation or for the benefit of the public in any way. The permit which Congress had given for its construction was not in the exercise of the dominant trust for the public benefit for which the bed of the stream was held. The company had no rights of ownership in the land or water. It was, therefore, held by this court that Congress could not and did not create any right which could affect its higher duty to the public, and when so constructed, the dam remained at all times subject to be removed upon the demand of the public interest. Hence it was in this connection that the court said on page 70:

> "Among these rights of use and enjoyment is the right, as against other riparian owners, to have the stream come to them substantially in its natural state, both in quantity and quality. They have also the right of access to deep water, and when not forbidden by public law may construct for this purpose wharves, docks and piers in the shallow water of the shore. But every such structure in the water of a navigable river is subordinate to the right of navigation, and subject to the obligation to suffer the consequences of the improvement of navigation, and must be removed if Congress in the assertion of its power over navigation shall determine that their continuance is detrimental to the public interest in the navigation of the river."

The right to construct for this purpose wharves, docks and piers, as used above, clearly referred to the riparian right of the owner to reach deep water, independent of any grant from the Government;—a right, however, which can only be exercised subject to the dominant right of the public—it clearly does not refer to the right to construct a wharf under governmental authority.

In other words, as we have just suggested, the riparian owner has the right of access to deep water, and when not forbidden by public law may construct for this purpose wharves, docks and piers in the shallow water of the shore, but if he does so without express authority granted in furtherance of the public interest and in aid of navigation, which is for the benefit of the public as well as the riparian owner, he does so in subordination to the right of navigation and at his own risk, because such privileges, if granted, are not held under the dominant trust, but in subservience to it.

But if he is invited to construct wharves and other structures, which are recognized as improvements to navigation, and as being in aid thereof, and therefore for the public benefit, as well as that of the owner, the State or Federal Government is carrying out the purpose of the dominant trust for which the bed of the stream is held, and this action on the part of the Government is within its power and authority and is a valid exercise thereof, and rights acquired thereunder are so held under and by virtue of the dominant trust and become stable and complete.

This distinction is clearly and distinctly recognized and set forth in the case of *Lewis Blue Point Oyster Co.* v. *Briggs, supra.* In the opinion of the court, at page 89, Mr. Justice Lurton says:

> "The case of the *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 335, has been cited as a

case in which the owners of a lock and canal and a franchise to take tolls were awarded compensation not only for the tangible property taken, but for the value to the company of the State's franchise to take tolls. That case really rests upon estoppel. The lock and dam had been constructed 'at the instance and implied invitation of Congress.' After stating the action of Congress, the court said:

'This is something more than the mere recognition of an existing fact; it is an invitation to the company to do the work; and when, in pursuance of that invitation, and under authority given by the State of Pennsylvania, the company has constructed the lock and dam, *it does not lie in the power of the State or the United States to say that such lock and dam are an obstruction and wrongfully there, or that the right to compensation for the use of this improvement by the public does not belong to its owner, the navigation company.'* " (Italics ours.)

What does the court mean by the language "that case really rests upon estoppel. The lock and dam had been constructed at the implied invitation of Congress"? Can Congress be estopped from withdrawing or revoking a right which it had not the power or authority to irrevocably grant? On the other hand, when it acts within the scope of its authority, and rights are acquired in pursuance of such grants, may it not be estopped from revoking them? This is clearly what the court meant. Congress when it granted the right to build the lock or dam was carrying out the dominant purpose for which the title to the bed of the river was held. It was promoting and aiding navigation for the benefit of the public, and the effect of its action was, as held by this court, to create

rights in the riparian owner which it was estopped to revoke.

Apply this principle to the case at bar and to every case in which the State or Federal Government establishes lines to which piers and wharves may be constructed by riparian owners in aid of navigation. These structures are recognized as the chief and most important improvements whereby navigation and commerce may be successfully carried on. Without them they are almost impracticable, and so the establishment of lines and the declaration by the Government that when piers and wharves are constructed thereto they shall be deemed to be lawfully there and shall be held not to obstruct navigation, such action on the part of the Government is as manifest an invitation as a single act of Congress offering a like invitation to an individual could be. We therefore submit that these two cases are direct authority for the position which we take.

In reading the case of *Gring* v. *Ives*, 222 U. S. 365, we were struck with the language of Mr. Chief Justice White, from which it would seem evident that he had in mind the distinctions which we have sought to draw between the rights conferred by the Government, subject to the dominant trust in which the beds of navigable streams are held, and those conferred *in the exercise, and in aid of the purposes, of the dominant trust* under which the submerged soil is held for the benefit of the public. At page 369 he says:

> "In disposing of a contention concerning an alleged harbor line established under the act of Congress of March 3, 1899, Chap. 425, sec. 10, 30 Stat. 1121-1151, and the proposition that the railway, because it projected beyond said assumed line, was a public nuisance, and therefore the complainant

was entitled to negligently and wantonly injure it, the court said (p. 138): (Referring to the opinion of the court below.)

'Whether there was a harbor line or not, the marine railway was a necessity for the repair of vessels. It was not shown to be located there illegally, or that it was a public nuisance; and if it had been, the tugboat was not authorized to run into it unnecessarily and negligently, as the evidence tended to show.'

The only one of the assignments of error filed at the time this writ of error was sued out, which in the remotest way relates to a Federal question, is the third, which is concerned with the reasoning of the court just referred to, and is based upon the assumption that there could be no recovery because of the asserted establishment by the Secretary of War, sometime between 1900 and 1902, of a harbor line under the authority of the act above mentioned. In argument the proposition to which the assignment relates is, that the court erred in not deciding that any structure projecting into the river beyond the established harbor line was illegal and a public nuisance which the plaintiff might wantonly injure or destroy. As we have seen, however, the court found as an undisputed fact that the railway in question was constructed and had been in operation many years before the establishment of the alleged harbor line. Under this condition the court was obviously right in holding that the railway had not been located in violation of the act of 1899 and was equally obviously right in deciding that the plaintiff had no right to recklessly injure it. The basis of the assumed Federal right

> rests upon the plainly erroneous assumption that the act of 1899 was intended to or did operate to paralyze all State power concerning structures of every character in navigable waters within their borders, and to destroy automatically all vested rights of property in such works, even though acquired prior to the act of 1899 under the sanction of State authority."

Thus the court not only recognized such structures as being in aid of navigation and hence lawfully maintained, but in effect says that the act of Congress of 1899, and the establishment of harbor lines thereunder, cannot affect the legality of a structure which has been constructed for use in, and in aid of navigation before its enactment. If this be true then the position taken by us in the first and second assignments of error should be sustained.

Our position therefore is—

1. That the State holds the bed of a navigable stream merely as trustee for the use of riparian proprietors and the public.

2. That its rights therein for which the submerged land is thus held in trust by the State, are not a mere license or privilege as held in some States, but are held to be and are recognized by the courts of this State as property, and when, in the exercise of these rights, tangible property is constructed and maintained under the authority and regulation of the trustee in carrying out the objects and purposes of the dominant trust under which it is held for the benefit of the public, by promoting navigation and commerce, it is private property in its fullest sense, as stable and as fully protected, as any other property, and like all other property of the individual, can only be taken for public use after just compensation.

3. That once recognized and held to be property there is no exception made in the Constitution as to its protection.

4. That in the taking of said property the Government is not dealing with it in a proprietary, but in its governmental capacity, and if property rights have been acquired in the manner hereinbefore indicated, while they are subject to its governmental authority and may be taken for public use, yet "the Constitution in the fifth amendment guarantees that when this governmental right of appropriation—this asserted paramount right—is exercised, it shall be attended by compensation." *United States* v. *Lynah*, 188 U. S. 445, 464, cited and quoted from in *U. S.* v. *Buffalo Pitts Co.*, 234 U. S. 228, 234.

5. That any physical invasion whereby the owner is deprived of the possession or use of any portion of it is a taking within the meaning of the Constitution.

We earnestly submit that these structures are recognized by the courts everywhere as being not merely for the benefit of the owner but as being in aid of navigation, as being so essential to navigation that without them commerce could not be carried on. That when the State or Congress authorizes their construction it is acting in the fulfillment of the trust for which it holds the land for the benefit of the public and that its policy is to promote rather than to hamper their construction by rendering them as stable and the investment of money in their construction and development, as secure as can be by recognizing them as property fully protected under the Constitution.

Thus the Government while it encourages the construction of these facilities for navigation and commerce, loses none of its authority in their regulation because it can at any time exercise the right of eminent domain, and the expense will be a most profitable investment in the public interest.

Any other construction of the rights of riparian owners and any other policy which will affect navigation and the public enjoyment thereof would render property of this character so unstable, and investments so uncertain, as to burden and destroy commerce rather than promote it.

Respectfully submitted,

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Counsel for Greenleaf Johnson Lumber Company.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1914.

Record No. 678.

GREENLEAF JOHNSON LUMBER COMPANY, A CORPORATION, APPELLANT,

v.

LINDLEY M. GARRISON, SECRETARY OF WAR OF THE UNITED STATES, AND HENRY S. BRECKENRIDGE, ASSISTANT SECRETARY OF WAR OF THE UNITED STATES, APPELLEES.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

REPLY BRIEF FOR APPELLANT.

The suggestion made by the Assistant Attorney General that the appellant's wharf was out of repair is a matter

which may more appropriately be addressed to a jury in condemnation proceedings than to this court in determining the rights of the appellant to compensation for the taking of it; for here the value of the wharf does not enter into the question of the constitutional right of the Government to take it without paying its value therefor, whatever that value may be. It is a valuable structure, made of piling and filled between with earth and slabs, and as so constructed is most permanent and substantial in its character. Until a few years ago it had been actively used, but has recently been permitted to become out of repair, and has not been used as it formerly had been, but has in no sense been abandoned, and the owner was about to put upon it the needed repairs when the proceedings by the Government to acquire it were first instituted, on account of which its repair was postponed. See letter of the appellant to the acting secretary of the navy, dated August 29, 1911, (record page 38) and the testimony of S. L. Spratley, on page 41.

So substantial was this structure that the idea of treating it as what the Assistant Attorney General now sees fit to term a "derelict," never entered the minds of the Government officials, who, after making negotiations for its purchase and failing to agree on a price, so far recognized it as a lawful structure belonging to the complainant, that they instituted proceedings for its condemnation, and after its value had been investigated and the damage which the appellant would suffer had been ascertained, the Government suddenly abandoned those proceedings, and afterwards took steps to forcibly destroy it, matters not suggested in the pleadings

The conclusions of the Assistant Attorney General seem to be based upon four premises:

First. That the wharf had been originally constructed without State authority.

Second. That a subsequent establishment by it of harbor lines in no way ratified or strengthened the appellant's right of property therein.

Third. That the State's control of its waters and of navigation therein is merely permissive, and all authority ceases when the United States chooses to act, and that thereafter all State measures affecting future control become ineffective, and whatever has been done without the consent of the *Federal* Government is annulled unless continued in force with federal approval; from which he argues that action on the part of the Federal Government assuming control of the subject, not only precludes future regulation by State authority, but annuls and destroys all rights which had been previously acquired under State authority; and

Fourth: That all such property is held by merely a revocable license, subject to be annulled at any time by Congress.

Concerning the first of these premises, let us see what the facts are in the agreed statement of facts (record page 36). It was stipulated that the statute providing for the appointment of a board of harbor commissioners for the city of Norfolk was first enacted in 1875, but that prior to said date harbor masters had been regularly appointed for the harbor of Norfolk, Portsmouth and Norfolk county, with power and authority as prescribed in the statute providing for such offices, to which for its terms and conditions reference may be made at any state of these proceedings by either party to this cause. Referring to this statute we find that as far back as 1801 there was passed by the General Assembly of Virginia an act entitled "An act concerning the docks and wharves in the borough of Norfolk."

Section 3 of that act is as follows:

> "And Whereas the owners of lots on the River and Creeks are constantly extending their Wharves and Breast-Works beyond each other, whereby the navigation is greatly obstructed, *be it therefore*

further enacted, that the said Wardens, assisted by the Surveyor of the County, shall run a line from the east to the west end of the said Borough on the water, having due regard to the depth of the water, from the one of the Town to the other, so as not to obstruct the navigation of the River; and moreover run a line on each side of the Creeks, so as to leave a Canal of at least forty feet wide in the middle thereof, beyond which said lines no person shall extend any Wharf or Breast-Work, under the penalty of ten thousand dollars to be recovered in the name of the Wardens by Action of Debt, either in the District Court of Suffolk, or County Court of Norfolk, with costs, and applied towards improving the streets on the River or Creek-sides in whichever place the offense is committed, deducting five per centum to be retained by the Wardens as a commission for their trouble; and in case the Wardens shall fail to sue within three months after the extention of any Wharf or Breast-Work beyond the lines so to be laid off, it shall be lawful for any other person to sue for such penalty to be applied as aforesaid; the person so sueing shall receive five per centum as a commission for his trouble. All expenses incurred in running said lines shall be provided for by the Common Hall of said Borough of Norfolk."

This statute remained in force until April 22nd, 1874, when it was repealed by an act of the General Assembly approved that day. On February 18th, 1875, an act of the General Assembly of Virginia was approved, entitled "An Act to create a Board of Harbor Commissioners of Norfolk and Portsmouth and for the preservation and improvement of the harbor of Norfolk and Portsmouth," in which statute this board of harbor commissioners was given power to define and regulate the port warden's lines along the water

fronts of the cities of Norfolk and Portsmouth and the Elizabeth river.

Sections 9 and 10 of that statute read as follows:

> 9. "Be it further enacted, That no person shall build any wharf or other obstruction beyond the lines fixed by said commissioners, and any person doing this shall pay the sum of twenty dollars for every such offense, and shall moreover be fined in the sum of twenty dollars for every day such wharf or other obstruction shall remain; and no person shall hereafter build or extend any wharf or other obstruction in or upon the waters of the harbor of Norfolk or Portsmouth, Elizabeth river and branches thereof, without first obtaining, in writing, from said harbor commissioners, a permit for so doing, under a penalty of twenty dollars for every day such wharf or obstruction shall remain; and it shall be the duty of said board of commissioners to prosecute for the fines and penalties imposed by this act.
>
> 10. Be it further enacted, That it shall be the duty of the harbor commissioners, or a committee thereof, to examine from time to time, all the docks, public and private, in Norfolk and Portsmouth, and when it is the opinion of said commissioners, or a majority of them, that any such docks are not in a proper condition for the purposes for which they were designed and used, they shall cause a notice to be served upon the owner or occupier of said dock, and they shall repair and deepen the same, and if such owner or occupier shall neglect or refuse to attend to such dock or wharf, after twenty days' notice, such person so offending shall forfeit and pay twenty dollars, and the further sum of five dollars for every day he, she or they, shall so neglect

> or refuse, and shall, moreover, pay all expenses incurred by reason of such neglect or refusal."

This act was amended by an act approved March 3rd, 1882, but the provisions conferring power on the board of harbor commissioners to regulate and define the port warden's lines and the provisions of sections 9 and 10 quoted above were not amended.

It was further stipulated that prior to 1873 the wharf and a portion of the log pond was established and used, but that in 1883 or 1884 the same were enlarged and improved to their present dimensions, all of which was within the harbor lines which the state had established. It is also alleged in the bill (rec. p. 3), and not denied, that on the 24th day of November, 1883, the wharf being then in need of repairs, the board of harbor commissioners of the port of Norfolk adopted a resolution in the following language:

> "Resolved, that permission be granted to Greenleaf Johnson and Company to repair their wharf under the supervision of the engineer of this port, provided such repairs are done within the limits of the port warden's line."

That accordingly, the engineer of the harbor board again surveyed and located the port warden's line at that place, and pursuant to the permission which was granted by that resolution, the appellant repaired its wharf at a large expense, keeping the same within the limits of the port warden's line, as required by the said resolution. Its use was actually continued thereafter by them in the conduct of their business until the last few years, as hereinbefore stated.

Thus we see that whatever may have been the rights of the appellant prior to 1883, the enlargement and improve-

ment of its wharf to the harbor line were at that time made under the resolution above set forth, and were so made under the direct invitation and authority of the state of Virginia. Congress at that time had assumed no control whatever.

Counsel urges that because this structure had been built prior to the establishment of these lines it was subject to removal without compensation, even though the establishment and maintenance of such lines, whether by the State of Virginia or the Federal Government, had for years amounted to a declaration of the fact that they were located upon lands which had thus been set apart for that purpose. In other words, his position seems to be that no matter how distinctly the State or Federal Government should recognize their legality in this public manner, the owner could acquire no vested rights in them unless he should pull them down and build them over again. On this subject we respectfully refer to what we said on pages 9 and 10 of our brief.

Confronted with the fact that the numerous authorities which we have cited say that vested rights in such property which are protected by the Fifth Amendment of the Constitution can be acquired in such structures, and seeing, too, that the record here presents a case in which not only was the legality of this wharf recognized by the location of these harbor lines first by the State and then by the Federal Government, and its uninterrupted use and maintenance there for many years after they were so established, but its construction to its present dimensions was invited and permitted by express affirmative action on the part of the State, upon the faith of which large sums of money were expended, counsel for the Government is forced to the position that neither the recognition of its legality through the establishment of harbor lines by the State, nor a similar recognition by Congress itself, through the establishment of harbor lines for the Government, nor even the express grant by the State before Congress had

ever assumed control, can confer any vested rights whatever.

That prior to 1890, when the harbor lines in this port were first established by the Secretary of War, grants of such rights from the Federal Government could only be acquired through acts of Congress. In other words, every owner of a wharf or pier which had been constructed within the lines prescribed by States authority prior to 1890 has no vested right therein, even though it be within the lines which were subsequently established by Federal authority, and was not outside of the prescribed limits, and such owner, in order to acquire vested rights therein, must get an act of Congress ratifying its legality, or must tear it down and build it over again.

Let us see the logical as well as the practical result of this. It is the recognized policy of both Governments, State and Federal, to encourage these facilities and improvements in the interest of navigation and commerce. They are recognized as the most usual execution by the Government of the dominant trust for which the beds of navigable waters are held. Now, suppose "A" forty years ago constructed and has since that time maintained a wharf to the port warden's line, as established by the State, and in 1883 obtained its express permission to enlarge and improve the same to the established line, and did so at large expense, which wharf has, since 1899, when it adopted the same line, been recognized by the Federal Government as legally constructed and maintained; and during all that time he has thus contributed to the development and enlargement of commerce and navigation at this port and has thus advanced the public interest; and suppose "B," who owns the adjacent shore-land, had during all that time permitted his property to remain idle and unimproved and had contributed nothing towards the public interest or the advancement of commerce and navigation, but had in 1910 (just a year before the change of the port warden's

line to its present location) constructed his pier immediately adjacent to that of "A" and out to exactly the same line to which "A's" wharf extends; and suppose in 1911 the Secretary of War sees fit to change the harbor lines so as to cut off the ends of both piers; according to the position taken by the Government, "A," who has thus maintained his wharf in the interest of commerce and navigation on submerged soil, recognized as the place upon which it should be constructed, can receive nothing for his property, while B, who has just put his there, ten years after the establishment of the same harbor lines by the Federal Government, would be entitled to compensation for his property. The fallacy of such a position and the injustice of such a policy must be apparent.

Let us briefly consider the theory of these statutory enactments under which harbor lines are established and what they are for. In sparsely settled localities, recognizing the principle which we announce in our brief, permission to construct wharves to navigable water by riparian owners is usually obtained from the State through private legislation granting such permission, thus securing action by the State in the exercise of the dominant trust for which the property is held by it. So at times Congressional authority is obtained through special legislation. But in thickly populated localities, such as the water fronts of cities, this method of obtaining governmental authority, under which vested rights in such property can be obtained, and large investment therein made reasonably secure, became inconvenient, expensive and burdensome. To obviate this, laws were passed whereby lines were located to which any riparian owner could build under an authority intended to be an affirmative invitation and permission from the Government (State or Federal, as the case may be), subject to such regulations as that Government may prescribe. These laws carry exactly the same

privileges and confer exactly the same rights as special statutes could confer.

Now suppose a wharf had been built by a riparian owner to the channel of a river without affirmative legislation permitting it. It is there at the risk of the owner. But suppose by subsequent legislation his right to maintain it there is recognized by a statute declaring that his wharf does not obstruct navigation, and shall be deemed to be lawfully there; is not his right to so maintain it as firmly established as it would have been had such right been obtained before the construction of the wharf? So when these lines are afterwards located under State or congressional legislation, the Government, as is said in *Sullivan Timber Company* v. *Mobile*, 110 Fed. 194, quoted on page 43 of our brief, "virtually says to him if he constructs his structures in conformity with such rules and regulations, it shall be lawful for him to do so." This is as true of an act of Congress establishing harbor lines as it is of a similar State statute.

If this be so, then the wharf which is now the subject of this litigation is lawfully held under the express grant of right from the State in 1883, and under express authority derived from both State and Federal Governments, through the establishment of these harbor lines, and its construction and maintenance have been ratified and approved by both Governments.

But the Assistant Attorney-General takes the position that this is a mere license, revocable at the will of Congress; that when Congress acts, all rights acquired under State authority are revoked and annulled, and nothing short of an express grant from Congress can vest rights in a riparian owner. In the first place, if the establishment of the harbor lines by Congress in 1899 and the maintenance of this wharf for twelve years thereafter within that line is, as stated in *Sullivan Timber Co.* v. *Mobile*, *supra*, construed to mean that Congress has recognized its

legality and ratified its maintenance there, then we have such recognition by Congress itself as is required, even according to the Government's contention.

But is the Assistant Attorney-General correct in his potion? For example, suppose the State of Virginia had undertaken to remove this property in 1899, prior to the establishment of the same harbor lines by the Secretary of War, would it be contended that it had the power to do so without compensation being made? It was there not only in accordance with regulations of the State prescribing its location, and approved by the board of harbor commissioners as to its character, but was there under the express right conferred by direct permission granted by the representatives of the State in 1883, in the interest of commerce, on the faith of which large sums of money had been expended in its construction. Under these circumstances could the State order its removal without compensation? We submit that there can be no difference of opinion, and certainly no difference of decision upon this subject has been produced. It was therefore, up to that time certainly, property protected by the Federal Constitution, having been put there under authority of the Government whose power was then plenary.

We will not repeat here our discussion of the rights and powers of the States and the character of property which riparian owners can acquire from them, found in our brief, pages 47 *et seq.;* but we respectfully invite the attention of the court to what is there said upon this subject, and with due respect, will ask our opponent to reconcile his position with the following expressions made by this court in cases in which this subject was considered, and the following quotations taken from other recognized authorities.

In *Monongahela Navigation Company* v. *United States,* 148 U. S. 312, which counsel has sought to reconcile with his position, this court answering this very same argument which the Government then made, says on page 341:

> "The theory of the Government seems to be that the right of the navigation company to have its property in the river and the franchises given by the State to take tolls for the use thereof, *are conditional only*, and that whenever the Government in the exercise of its supreme power assumes control of the river *it destroys both the right of the company to have its property there* and the franchise to take tolls. But this is a misconception. The franchise is a *vested right*. The *State* has the power to grant it. It may take it as it may take other private property, for public uses upon the payment of just compensation. A *like*, though superior power, exists in the National Government. It may take it for public purposes, and take it even against the will of the State; but it can no more take the franchise which the *State* has given than it can any private property belonging to an individual." (Italics ours.)

In the case of *Scranton* v. *Wheeler*, 179 U. S. 141, in which the opinion of Mr. Justice Lurton, who was then Judge Lurton (57 Fed. 803), was adopted and approved, it is said:

> "A distinction exists between those cases where, under authority of the *State*, a structure has been placed in a navigable stream, such as a bridge, or lock and dam, as an improvement to the navigation of a stream wholly within its borders, and which is sought to be removed under the authority of subsequent Congressional legislation. In such case, the improvement, *being by authority of law*, can only be taken for public uses upon just compensation. This is the doctrine of the case of *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312." (Italics ours.)

He then quotes the language which we have just quoted from the *Monongahela case.*

In *Gring* v. *Ives,* 222 U. S. 365, 369, Chief Justice White says:

> "As we have seen, however, the court found as an undisputed fact that the railway in question was constructed and had been in operation many years *before the establishment of the alleged harbor line.* Under this condition the court was obviously right in holding that the railway had not been located in violation of the act of 1899 and was equally obviously right in deciding that the plaintiff had no right to recklessly injure it. The basis of the assumed *Federal right* rests upon the *plainly erroneous assumption* that the act of 1899 was intended to or did operate to *paralyze all State power* concerning structures of every character in navigable waters within their borders, and to *destroy automatically all vested rights of property in such works, even though acquired prior to the act of 1899 under the sanction of State authority.*" (Italics ours.)

In *United States* v. *Lynah,* 188 U. S. 445, this subject is again discussed, and the court quotes at length from the *Monongahela case* in support of the same doctrine, and then refers to the case of *Scranton* v. *Wheeler, supra,* as likewise sustaining the same principle, saying of that case:

> "It is true that a majority of the court held, in that case, that the destruction of access to land abutting on a navigable river by the construction by Congress of a pier on the submerged lands in front of the upland, was not a taking of private property for public uses, but only an instance of

> consequential injury to the property of the riparian owner. *But the right to compensation in case of a taking was conceded.* There have been many cases in which a distinction has been drawn between the taking of property for public uses and a consequential injury to such property by reason of some public work." (Italics ours.)

So in the case of *Weems Steamboat Co.* v. *People's Co.*, 214 U. S. 345, it is said:

> "The private wharf on a navigable stream is thus held to be property which cannot be destroyed, and it is property of the exclusive use of which the owner can only be deprived in accordance with established law, and if necessary that any part of it be taken *for the public use*, compensation must be made. The owner of a private wharf on a navigable stream does not on that account hold it by a different title than the owner of any other property which he may use himself or permit others whom he may select to use, while at the same time denying its use by anyone else." (Italics ours.)

The fact that that suit was between two corporations cannot affect the opinion of the court as to the right of the owner where it becomes necessary to take such property for *the public use.* We respectfully call attention to what is said with respect to that case on page 46 of our brief.

Then, too, we find the following expressions from other authorities:

In 1 Farnham on Waters and Water Rights, pages 510 and 511, it is said:

> "If the line is not fixed until after wharves have been erected, it cannot be drawn so as to destroy

a portion of them without making compensation to the owner. The line cannot be fixed for an ulterior purpose. The mere fixing of a harbor line confers no title on the riparian owner to the soil between the shore and the line so fixed; but the effect of the establishment of such line is generally held to be to permit the riparian owner to project his wharves or piers to it, or even to make a solid filling of earth to that point if consistent with the custom in force in the locality; and the one making such improvements *is also held to acquire the title to them.*"

And on pages 521 and 522:

"A wharf which has been erected for the convenience of commerce under the express or tacit permission *of the State*, by a riparian proprietor, *is private property of which he cannot be deprived without compensation*, and, as such, is subject to taxation; and equity will protect him from its removal as an illegal obstruction." (Italics ours.)

In *Sullivan Timber Company* v. *Mobile*, 110 Fed. 194, at pages 195-6, it is said:

"That" (State) "legislation, as we have seen, provides that it shall be unlawful to construct such wharves or other structures unless it be done in conformity with the rules and regulations prescribed by the State or under its authority. *It seems to me clear that, when the State of Alabama and the city of Mobile concur in saying to any person who proposes to build or extend a wharf or other structure into the channel of Mobile river that it shall be unlawful for him to do so unless he con-*

forms to certain rules and regulations, they virtually say to him, if he constructs his said structures in conformity with such rules and regulations, *it shall be lawful for him to do so.*

It is alleged in the bill that complainant constructed the wharf and other structures on the land involved in the ejectment suits under and by virtue of the invitation and license of the *State of Alabama and of the city of Mobile,* and that they were constructed in strict conformity with the State and city legislation on the subject, and with the rules and regulations thereunder prescribed. This license did not vest any right *until exercised,* and could only be exercised by one possessing riparian rights; *but when executed,* it was a lawful exercise of a privilege or license, *which became irrevocable,* and especially where expenditures were made in reliance upon the license, as is alleged in the bill. 2 Am. & Eng. Enc. Law (2nd ed.) 1145; *Rhodes* v. *Otis,* 33 Ala. 578; *Shively* v. *Bowlby, supra.*" (Italics ours.)

In *Horner* v. *Pleasants,* 7 Atl. 692, the Maryland Court of Appeals said:

"This was a purely *statutory* grant, and one that the *State* was fully competent to make. As said in *Chase's case,* 43 Md. 23, the right of the lot holders to make these improvements in the water is a franchise or vested right peculiar in its nature, *but a quasi property.* This statutory franchise was an incident or appurtenance to the lots fronting on the water. *It was the object of the State to hold out inducements to such lot owners to make these improvements for the benefit of the trade and com-*

> *merce of the city.* When made, they were declared to be the right of such improvers forever. In order to effect this object, it was not necessary to grant a technical fee in the land covered by the water. But the State did grant a perpetual use of such land for the purpose of erecting and keeping up these wharves, and this valuable license or franchise, *as long as used, she can no more annul than she could a patent in fee.*" (Italics ours.)

If the position of the Assistant Attorney-General be correct, that State could not grant a perpetual use of the property, however positive and emphatic its language may have been in conferring that right, and the same could have been taken by the Federal Government without compensation.

It is respectfully submitted that these quotations from the highest authority in the land and others are irreconcilable with the position taken by the Government in this case.

Finally, in answer to this position taken by the Government, we submit that as the regulation of interstate commerce in all its branches has been committed to Congress, action of the State with respect to certain features thereof local in their character is, in the absence of affirmative action by Congress, deemed to be the action of Congress itself through the State. See opinion of Mr. Justice Bradley in *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, in which, referring to the opinion of Mr. Justice Field in *Mobile County* v. *Kimball*, 102 U. S. 691, it is said:

> "Amongst other things it is there said: 'Where from the nature of the subject or the sphere of its operation the case is local and limited, special regulations adapted to the immediate locality could only

have been contemplated. State action upon such subjects can constitute no interference with the commercial power of Congress, for when that acts the State authority is superseded. Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the States and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time being, and until it sees fit to act, they may be regulated by State authority.'

"It is not necessary to cite other cases. The principle laid down in *Cooley* v. *Board of Wardens* has become fully recognized and established in our jurisprudence; and it is manifest that no subject can be more properly classified as local in its nature, and as requiring the application of local regulations, than that of wharves and wharfage."

From this it necessarily follows that the action of the State becomes, through the silence of Congress, the will of Congress itself with respect to the regulation of commerce, and State regulation is congressional regulation, and where rights are so acquired they are acquired and vested under and through the permission of Congress, and it is, therefore, estopped to deny them.

Respectfully submitted,

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J. L. JEFFRIES,
Counsel for Greenleaf Johnson
Lumber Company.

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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

GREENLEAF JOHNSON LUMBER COMPANY, a corporation, appellant,
v.
LINDLEY M. GARRISON, SECRETARY OF WAR of the United States, and Henry S. Breckenridge, Assistant Secretary of War of the United States, appellees. } No. 678.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF FACTS.

Appellant owns 8 acres of land on the southern branch of Elizabeth River, a navigable stream, in Norfolk, Va. Prior to 1873 a predecessor in title, without Federal or State authority, constructed fills into the river, which were decked over to make what are termed "wharves." In 1883 the Board of Harbor Commissioners, organized in 1875 under a Virginia statute, granted appellant permission "to repair their wharf" within the limits of the port warden's line,

which they had established in 1876. The record shows no subsequent repairs or improvements.

In 1890 this line was adopted by the United States as the Federal harbor line. The latter was changed in 1911 to its present location and appellant's structures thereafter, as was not the case before, protruded beyond the line. The greater part of certain fills, which with the river bank formed the sides of a rectangular log pond, no longer used except for storing a few piles "which have been there for some three years" (R., p. 44), come within the new line, but none of the other structures projects more than a foot or a foot and a half beyond it. The sides of this log pond "were pretty well worn out and dilapidated and are not safe to be used at present." (R., p. 44.)

Congress, by an act approved March 4, 1911 (Ch. 239, 36 Stat., 1265, 1275), made an appropriation for widening the channel and "dredging the bottom of the river at the point in controversy, pursuant to which the Government proposes to widen the channel to the new port warden's line." (Agreed statement of facts, R., p. 37.)

The Secretary of War notified appellant that portions of the sides of the pond which extended beyond the new harbor line were a menace to navigation and ordered their removal within 60 days, in default of which they would be removed by the United States. Appellant refused to comply with the order and brought this suit to enjoin the removal of the obstruction by the Government.

ARGUMENT.

The assignments of error relied upon by appellant (Brief, pp. 10–11) state the following propositions as comprising the issues in this case:

The Court of Appeals erred in holding that (1) the Secretary of War had authority to establish harbor lines and to require the removal of appellant's wharf; (2) its removal and destruction by the United States, without payment of compensation therefor, would not violate the provisions of the fifth amendment of the Constitution of the United States.

These propositions will be considered in their order.

I.

The Secretary of War was authorized to establish harbor lines and to require the removal of appellant's wharf.

The harbor line in question was established, after legal notice and hearing (R., p. 35–37) by the Secretary of War in 1911, under authority of an act approved March 3, 1899 (ch. 425, 30 Stat., 1121, 1151), which provides:

> SEC. 11. That where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors he may, and is hereby, authorized to cause such lines to be established, beyond which no piers, wharves, bulkheads, or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him.

This provision, in substantially the same form, had been previously enacted as section 12 of an act approved August 11, 1888 (ch. 860, 25 Stat., 400, 425), and also as section 12 of an act approved September 19, 1890 (ch. 907, 26 Stat., 426, 455).

After the harbor line had been established, it was found that the unused and dilapidated sides of appellant's log pond extended beyond it. The Secretary of War ordered the removal of this obstruction as a menace to navigation, and Congress appropriated money for widening the channel and dredging the river at this point. (Act of Mar. 4, 1911, ch. 239, 36 Stat., 1265, 1275.)

Thus, it appears, the Secretary of War was expressly authorized to establish the harbor line in question, and Congress, by making an appropriation "for dredging the bottom of the river at the point in controversy, pursuant to which the Government proposes to widen the channel to the new port warden's line" (agreed statement of facts, R., p. 37), has determined for itself the necessity for widening the channel and expressly directed the removal of the obstruction in question.

The appropriation of money for a specific object "is equivalent to an express direction by the legislative and executive branches of the Government to its officers to take this particular property for the public objects contemplated," etc. (*Juragua Iron Co.* v. *United States*, 212 U. S., 297, 303; *Gibson* v. *United States*, 166 U. S. 269, 276.)

The establishment by the Secretary of War of the harbor line of 1890 did not exhaust his powers in this respect, but there remained to him authority to change the line when and as often as the demands of navigation in his judgment made it necessary.

This court, in construing the same statutes and similar acts of the Secretary of War, held:

> It must be concluded, therefore, that it was competent for Congress to provide for the establishment of the harbor lines in question for the protection of the harbor of Pittsburgh. It acted within its constitutional power in authorizing the Secretary of War to fix the lines. (*Union Bridge Co.* v. *United States, supra*, pp. 385–388; *Monongahela Bridge* v. *United States, supra*, p. 192.) That officer did not exhaust his authority in laying the lines first established in 1895, but was entitled to change them, as he did change them in 1907, in order more fully to preserve the river from obstruction. And, in none of the acts complained of, did he exceed the power which had been conferred. (*Philadelphia Co.* v. *Stimson*, 223 U. S., 605, 638; *Monongahela Bridge Co.* v. *United States*, 216 U. S., 177.)

The judgment of Congress, as expressed by the appropriation act of 1911, supra, and through the authorized actions of the Secretary of War in establishing the harbor line and ordering the removal of the obstruction, was the exercise of legislative power and not subject to judicial review.

> So unfettered is this control of Congress over the navigable streams of the country that its judgment as to whether a construction

> in or over such a river is or is not an obstacle and a hindrance to navigation, is conclusive. Such judgment and determination is the exercise of legislative power in respect of a subject wholly within its control. (*United States* v. *Chandler-Dunbar Co.*, 229 U. S., 53, 64; *Gibson* v. *United States*, 166 U. S., 269, 272; *Pennsylvania* v. *Wheeling, etc.*, 18 How., 421; *Union Bridge Co.* v. *United States*, 204 U. S., 364.)
>
> But whether navigation upon waters over which Congress may exert its authority requires improvement at all, or improvement in a particular way, are matters wholly within its discretion; and the judiciary is without power to control or defeat the will of Congress, so long as that branch of the Government does not transcend the limits established by the supreme law of the land. (*Scranton* v. *Wheeler*, 179 U. S., 141, 163.)

Despite the above authorities, appellant, under *School of Magnetic Healing* v. *McAnnulty* (187 U. S., 94), asserts the reviewability of the action taken by the authorities in the instant case. The case cited is inapplicable, since it does not present the question of reviewability of a finding of fact. On the other hand, the court took pains to state that the decision of the Postmaster General reviewed was one of law and not of fact.

> The facts, which are here admitted of record, show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which

> the Postmaster General has assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding to grant relief. (Pp. 109, 110.)

In the instant case the decision was one of fact. The record does not attempt to show all facts which determined the judgment, nor was the Secretary or any Member of Congress called to testify. The facts lleged by appellant as showing abuse of discretion were denied, and, it is submitted, the proof offered is so unsubstantial as not to merit serious consideration, even if the exercise of discretion in this case were reviewable.

II.

The removal of appellant's wharf, without payment of compensation therefor, will not contravene the fifth amendment.

The law with respect to title to beds of navigable streams is definitely settled.

> The technical title to the beds of the navigable rivers of the United States is either in the States in which the rivers are situated, or in the owners of the land bordering upon such rivers. Whether in one or the other is a question of local law. (*United States* v. *Chandler-Dunbar Company*, 229 U. S., 53, 60.)

The riparian owner, under the laws of Virginia, owns only to low-water mark, while the State holds title to the bed of the stream. (Code of Virginia,

1904, sections 1338, 1339. Quoted appellant's brief, p. 26.)

The technical title to the submerged land in question, therefore, is in the State of Virginia, subject, however, to the paramount right of the United States to regulate navigation.

The State may, within the scope of its power, grant and regulate riparian rights.

> The later judgments of this court clearly establish that the title and rights of riparian or littoral proprietors in the soil below high water mark of navigable waters are governed by the local laws of the several States, subject, of course, to the rights granted to the United States by the Constitution. (*Shively* v. *Bowlby*, 152 U. S., 1, 40.)

Appellant claims to have derived from the State such rights in the structure sought to be removed as will constitute it private property, the removal of which will be a "taking" in the sense of the provisions of the fifth amendment of the Constitution of the United States.

The State may not, however, grant rights it does not possess and any attempt to dispose of rights vested in the United States by the Constitution will be ineffective.

What rights, then, does the State of Virginia possess; and what rights, if any, were actually granted to appellant?

The grantable rights of Virginia may be ascertained by determining what power over the control

and improvement of navigable rivers was vested in the United States by the Constitution.

> This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. (*Gibbons* v. *Ogden*, 9 Wheat., 1, 196; *Gilman* v. *Philadelphia*, 3 Wall., 713, 725; *Philadelphia Co.* v. *Stimson*, 223 U. S., 605, 634.)

Although the Federal power is absolute, the State may exercise dominion over navigable waters until the United States assume control. The State's control, however, is merely permissive and all authority ceases when the United States act. Thereafter all State measures affecting future control become ineffective and whatever has been done, without the consent of the Federal Government, is annulled, unless continued in force with Federal approval.

> Although, until Congress acts, the States have the plenary power supposed, yet when Congress chooses to act it is not concluded by anything that the States, or that individuals by its authority or acquiescence, have done, from assuming entire control of the matter, and abating any erections that may have been made, and preventing any others from being made, except in conformity with such regulations as it may impose. It is for this reason, namely, the ultimate (though yet unexerted) power of Congress over the whole subject matter, that the consent of Congress is so frequently asked to the erection of bridges over

navigable streams. (*Willamette Bridge Co.* v. *Hatch*, 125 U. S., 1, 12–13.)

So wide and extensive is the operation of this power that no State can place any obstruction in or upon any navigable waters against the will of Congress, and Congress may summarily remove such obstructions at its pleasure. (*Stockton, Atty. Gen. of New Jersey*, v. *Baltimore & N. Y. R. Co.*, 32 Fed., 9, 20.)

The consent of the Federal Government must be evidenced by some affirmative action.

It is for Congress to determine when it will exert its power to regulate interstate commerce. Its mere silence or inaction when individuals or corporations, under the authority of a State, place unreasonable obstructions in the waterways of the United States, can not have the effect to cast upon the Government an obligation not to exert its constitutional power to regulate interstate commerce except subject to the condition that compensation be made or secured to the individuals or corporation who may be incidentally affected by the exercise of such power. (*Union Bridge Co.* v. *United States*, 204 U. S., 364, 400–401; *Philadelphia Co.* v. *Stimson*, 223 U. S., 605, 637.)

The establishment by the Secretary of War of the harbor line in 1890 is the only action claimed by appellant to show such consent. It is contended that this was an invitation to appellant to build to this line and an approval of previously erected structures.

To work an estoppel, there being no express authorization, it would be necessary to show some expenditure, or loss sustained, in reliance upon the alleged implied authority. (*Bloomfield* v. *Charter Oak Bank*, 121 U. S., 121, 135.) But it is undisputed that appellant's structure was erected without any authority whatever, either State or Federal, and that the only repairs or expenditures ever made upon it were in 1883, seven years prior to the establishment of the Federal harbor line. Nothing, therefore, was done or suffered by appellant in reliance upon the alleged Federal authorization. But, even if this were not true, still the mere establishment of a harbor line could not be held to so ratify everything *previously* done conformably thereto as forever afterward to preclude the Government from regulating or removing, without compensation, structures that might extend beyond a new line subsequently established.

We have seen in the *Stimson* case, supra (223 U. S., 605, 638), that the Secretary of War may change the harbor line whenever he thinks conditions justify it. Every riparian owner, therefore, who erects a structure in a navigable stream, does so subject to the probable change of the line and can not complain of, or demand compensation for, the removal of such structure, unless erected with the express consent of Congress. This is the reason "that the consent of Congress is so frequently asked to the erection of bridges over navigable streams." (*Willamette Bridge Co.* v. *Hatch*, 125 U. S., 1, 13.)

He, therefore, who, without the consent of Congress, erects a structure in a navigable stream, over which Congress has not yet assumed control, even with the express consent of the State, does so in view of and subject to the power of Congress to annul the State's action and to require its removal if, in the judgment of Congress, it is an obstruction to navigation. This is an implied condition of the permission granted, and just as binding as if expressly reserved.

> If its judgment be that structures placed in the river and upon such submerged land, are an obstruction or hindrance to the proper use of the river for purposes of navigation, it may require their removal and forbid the use of the bed of the river by the owner in any way which in its judgment is injurious to the dominant right of navigation. So, also, it may permit the construction and maintenance of tunnels under or bridges over the river, and may require the removal of every such structure placed there with or without its license, the element of contract out of the way, which it shall require to be removed or altered as an obstruction to navigation. (*United States* v. *Chandler-Dunbar Co.*, 229 U. S., 53, 62, 63; *West Chicago R. R.* v. *Chicago*, 201 U. S., 506, 521.)

Necessarily is this true because the State has no power to limit, even if it attempted to do so, the control of Congress and can only grant rights or licenses until, and terminable when, Congress assumes control.

The right or license, for appellant claims no title, to maintain the wharf under State authority until Congress acts, may be, as between appellant and third parties or the State, property, as held by the Virginia court, and may not, during its life, be taken without payment of compensation. But when Congress, in the exercise of its power, declares the license at an end and orders the removal of the structure as an obstruction to navigation, relatively to the United States, the property no longer exists because the right has terminated. In other words, appellant was merely a licensee at will of the United States, without authority to maintain the structure after the license terminated. To require the removal of same, therefore, is not taking private property within the meaning of the fifth amendment. (*West Chicago R. R.* v. *Chicago*, 201 U. S., 506, 526; *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 Fed., 9, 20.) The damage, if any, is remote or consequential and is *damnum absque injuria*.

> If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution. (*C., B. & Q. Ry. Co.* v. *Drainage Com'rs*, 200 U. S., 561, 593.)

In a recent case, very similar to the one at bar, the owner of land under navigable waters brought suit to enjoin the destruction of its oyster beds by

dredging, under authority of Congress, to improve the channel. The court held:

> If the public right of navigation is the dominant right, and if, as must be the case, the title of the owner of the bed of navigable waters holds subject absolutely to the public right of navigation, this dominant right must include the right to use the bed of the water for every purpose which is in aid of navigation. This right to control, improve and regulate the navigation of such waters is one of the greatest of the powers delegated to the United States by the power to regulate commerce.
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> * * * * *
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> By necessary implication from the dominant right of navigation, title to such submerged lands is acquired and held subject to the power of Congress to deepen the water over such lands or to use them for any structure which the interest of navigation, in its judgment, may require. The plaintiff in error has, therefore, no such private property right which, when taken, or incidentally destroyed by the dredging of a deep-water channel across it, entitles him to demand compensation as a condition. (*Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S., 82, 87, 88.)

In another case, decided at the same time, it was sought to enjoin the United States from removing, without payment of compensation, dams and other water-power machinery placed in a navigable river under permits from the Secretary of War revocable at will. This court held in that case that the removal

of such obstructions was not a taking of private property in the sense of the fifth amendment.

> But every such structure in the water of a navigable river is subordinate to the right of navigation, and subject to the obligation to suffer the consequences of the improvement of navigation, and must be removed if Congress in the assertion of its power over navigation shall determine that their continuance is detrimental to the public interest in the navigation of the river (citing cases). (*United States* v. *Chandler-Dunbar Co.*, 229 U. S., 53, 70; *Gibson* v. *United States*, 166 U. S., 269, 276; *Transportation Co.* v. *Chicago*, 99 U. S., 635.)

The implied condition in the instant case is of equal force with the express reservation in the above case, and, therefore, the latter is authoritative.

In *Union Bridge Company* v. *United States* (204 U. S., 364), a leading case on this subject, and one in which previous decisions are carefully considered, the company, which had erected a bridge under express authority of the State of Pennsylvania, sought to enjoin the United States from requiring it, at its own expense, to remove the bridge and erect a new one in order to meet the requirements of navigation. It was held that:

> Although the bridge, when erected under the authority of a Pennsylvania charter, may have been a lawful structure, and although it may not have been an unreasonable obstruction to commerce and navigation as then carried on,

it must be taken, under the cases cited, and upon principle, not only that the company when exerting the power conferred upon it by the State, did so with knowledge of the paramount authority of Congress to regulate commerce among the States, but that it erected the bridge subject to the possibility that Congress might, at some future time, when the public interest demanded, exert its power by appropriate legislation to protect navigation against unreasonable obstructions. Even if the bridge, in its original form, was an unreasonable obstruction to navigation, the mere failure of the United States, at the time, to intervene by its officers or by legislation and prevent its erection, could not create an obligation on the part of the Government to make compensation to the company if, at a subsequent time, and for public reasons, Congress should forbid the maintenance of bridges that had become unreasonable obstructions to navigation. (*Union Bridge Co.* v. *United States*, 204 U. S., 364, 400.)

In conformity with the adjudged cases, and in order that the constitutional power of Congress may have full operation, we must adjudge that Congress has power to protect navigation on all waterways of the United States against unreasonable obstructions, even those created under the sanction of a State, and that an order to so alter a bridge over a waterway of the United States that it will cease to be an unreasonable obstruction to navigation will not amount to a taking of private property for

public use for which compensation need be made. (Idem, 401.)

In the case of the *C. B. & Q. Railway Co.* v. *Drainage Com'rs* (200 U. S., 561), the railway company, which was the owner not only of both banks of the stream but also of its bed, was required at its own expense, at the instance of the city of Chicago, to lower its tunnel, constructed under the river with the city's consent, in order that the channel of the river might be deepened to meet the requirements of navigation. The court held that to require this of the railway company would not be taking its property without compensation.

A similar ruling was made in the case of *West Chicago R. R. Co.* v. *Chicago* (201 U. S., 506), where, at the instance of drainage commissioners, appointed under statutory authority, the railroad company was required at its own expense to alter a bridge lawfully constructed.

This principle has been, in other cases, repeatedly announced by this court.

Gilman v. *Philadelphia*, 3 Wall., 713.
Weber v. *Harbor Commissioners*, 18 Wall., 57.
Atlee v. *Packet Co.*, 21 Wall., 389.
South Carolina v. *Georgia*, 93 U. S., 4.
Gibson v. *United States*, 166 U. S., 269.
Scranton v. *Wheeler*, 179 U. S., 141.
New Orleans Gas Light Co. v. *Drainage Com'rs*, 197 U. S., 453.
Monongahela Bridge Co. v. *United States*, 216 U. S., 177.

Hannibal Bridge Co. v. *United States*, 221 U. S., 194.

Jackson v. *United States*, 230 U. S., 1, 23.

An entirely different situation arises when consent to the erection of a structure has been expressly and unconditionally given by Congress. The element of contract or estoppel then enters, and the structure so erected may not be removed without payment of compensation therefor.

This is all the case of *Monongahela Navigation Co.* v. *United States* (148 U. S., 312), which appellant relies upon, holds, and it is clearly distinguishable from the instant case. In the *Monongahela case* the dam and locks sought to be removed were erected under authority of an act of Congress, which, in appropriating $25,000 for the improvement of the Monongahela River, provided:

> But this sum shall not be expended until the Monongahela Navigation Company shall have undertaken in good faith the building of lock and dam number seven at Jacobs Creek, and until said company shall, in manner satisfactory to the Secretary of War, give assurance of their ability and purpose to complete the same. (Quoted in *Monongahela Navigation Co.* v. *United States*, 148 U. S., 312, 315.)

This, of course, was an express authorization to erect the structures. The distinction between this case and others like the case at bar was recognized by this court in the following language:

> That case (*Monongahela Navigation Co.* v. *United States, supra*) really rests upon estoppel. The lock and dam had been constructed "at the instance and implied invitation of Congress." (*Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S., 82, 89.)

In *United States* v. *Lynah* (188 U. S., 445), the question was whether the overflowing of the fast lands of the owner of the absolute title thereto was a taking of private property. The question of damage to or removal of structures erected in navigable waters was not involved.

None of the other cases chiefly relied upon by appellant involved adjudications of rights of the United States, but are suits between private parties. Therefore "we may also lay out of consideration the cases cited which deal with the rights of riparian owners upon navigable or nonnavigable streams as between each other." (*United States* v. *Chandler-Dunbar Co.*, 229 U. S., 53, 70.) Such rights are "subordinate to the public right of navigation, and however helpful in protecting the owner against the acts of third parties, is of no avail against the exercise of the great and absolute power of Congress over the improvement of navigable rivers." (Idem, 62.)

In some of the cases relied upon by appellant the language is broad, but mere obiter so far as the issues in the present case are concerned. For example, the point adjudicated in *Yates* v. *Milwaukee* (10 Wall., 497), as this court has said in *Shively* v. *Bowlby* (152 U. S., 1, 40), "was that the

mere declaration of the city council that the wharf already built and owned by the plaintiff was a nuisance did not make it such, or subject it to be removed by authority of the city."

The same is true of the language used in *Weems Steamboat Co.* v. *People's Co.* (214 U. S., 345), in which the contest was between two steamboat companies for the right of one to the use of the wharf of the other on a navigable waterway, clearly a contest between private parties and not involving the questions presented in the case at bar.

Whatever may have been the broad language of the court in the cases upon which appellant relies, it seems that the questions at issue in this case are no longer debatable, and it is confidently asserted, in the language used by this court in a similar case, that:

> In short, the damage resulting from the prosecution of this improvement of a navigable highway, for the public good, was not the result of a taking of appellant's property, and was merely incidental to the exercise of a servitude to which her (its) property had always been subject. (*Gibson* v. *United States*, 166 U. S., 269, 276.)

III.

Structure erected without State authority.

Appellant claims that, even if no Federal consent was obtained, the State of Virginia had authorized the structure before Congress had assumed control, and consequently the United States were bound by

the State's action, or, as appellant expresses it, "Congress steps into the shoes of the State and takes charge where she left off." (Brief, p. 49.)

We have seen that this contention is unsound; but even if State authority were sufficient to preclude forever the exercise of proper Federal control over navigable waters without payment of compensation for the removal of structures placed therein without Federal consent, nevertheless, appellant's case must fall, since the record shows that no authority for the erection of the structure in question was granted by the State. There were allegations, but no proof.

Mere silence or inaction on the part of the State Government when structures are being erected within its waters, perhaps in obscure and sparsely settled sections of the State, is not sufficient to show authority for its erection.

> He (riparian owner) can not occupy to the prejudice of navigation or cause obstructions to be placed upon the shore between these lines (high and low water marks) *without express authority of the State.* (*Philadelphia Co.* v. *Stimson*, 223 U. S., 605, 629; *Union Bridge Co.* v. *United States*, 204 U. S., 364; *West Chicago R. R.* v. *Chicago*, 201 U. S., 506, 523.)

The only affirmative actions relied upon are the establishment by the Board of Harbor Commissioners in 1876 of a harbor line which coincided with appellant's wharf line and the permission, granted by the board in 1883, to repair same. These acts, being subsequent in time, can not be regarded, as argued by appellant, as an invitation to erect structures under the implied understanding that they

should not be subject to removal. Nor can the permission to repair be so construed, since such action is equally compatible with the idea that some public inconvenience might be permitted in order to avoid the necessity of requiring the removal of the structure until the public need became more pressing.

While claiming that State authorization is sufficient, appellant admits that it must be shown.

> (1) If a riparian owner undertakes to exercise any of his rights as such without consulting the trustee, so to speak, that is, without getting the permission of the State, whether it be to plant oysters, or to reach navigable water by a wharf, or pier, he does so at his risk, and the trustee may require the removal of either whenever in its judgment the higher trust under which the authority is held demands it. (Appellant's brief, p. 20.)

We have seen that no permission, legally sufficient, was obtained from the State. By its own admission, therefore, appellant can not prevail in this suit.

However this may be, certainly nothing more could be presumed than was authorized by the statute under which the board operated. This statute expressly empowered the board to remove, at the owner's expense, any wharf or other obstruction to navigation that they might deem injurious to the harbor.

> That the said board of harbor commissioners shall have full power to regulate and define the port wardens' lines along the water front of the

> cities of Norfolk and Portsmouth, and the Elizabeth River, and branches thereof, for 5 miles above and below the limits of said cities. They shall have power to fix the lines along said rivers within which the riparian owners may erect wharves, docks, and other proper erections and fixtures for commercial and manufacturing purposes. The said board, or a majority of them, shall have authority to cause the removal of any wharf, dock, wreck, or other obstruction to navigation, or that may, in their opinion, be injurious to the harbor, at the expense of the owner or owners, or the parties causing the obstructions: *Provided*, The rights of any owner or owners of wharves, whose lines have heretofore been fixed by authority of state legislation, are in nowise to be disturbed. (Act of Virginia Assembly, approved Feb. 18, 1875, Laws of Virginia, 1874, 1875, page 82. An act to create Board of Harbor Commissioners, etc.)

In construing this statute the Supreme Court of Appeals of Virginia said:

> In this State, the enjoyment of the right (riparian) is made subject by statute to the limitation that its exercise shall not result in the obstruction of navigation, nor in other injury to the private rights of any person. (*Groner* v. *Foster*, 94 Va., 650, 651.)

It appears, therefore, that not only was no express authority granted by the State to maintain the structure in question, but that, under the only applicable law of Virginia, permission could be granted for its continuance only until such time as the board

might exercise its "authority to cause the removal of any wharf, dock, wreck, or other obstruction to navigation, or that may, in their opinion, be injurious to the harbor, at the expense of the owner or owners, or the parties causing the obstructions."

There is nothing in the record to show, nor is it claimed, that appellant's line had theretofore—that is, prior to the enactment of this statute—"been fixed by authority of State legislation." These words were changed in 1887 to read "been fixed by authority of law," as quoted in appellant's brief, page 38. However, this change, if significant at all, came too late to be material in this case.

Under appellant's own theory of the case, therefore, the discretion vested in the board of harbor commissioners to declare the structure an obstruction to navigation and to order its removal without payment of compensation, passed to the Secretary of War when the United States assumed control over the river. The Secretary of War has exercised such discretion, and the removal of the obstruction by the United States without paying compensation therefor will not be a taking of private property within the meaning of the provisions of the fifth amendment.

CONCLUSION.

Since appellant failed to secure authority of Congress, it acted at its own risk in erecting the structures in question, and can not now complain because it must submit to the removal of the mere débris of a structure, which it had used since its erection

until it had become so dilapidated that, in the words of its superintendent, it is "not safe to be used at present." (R., p. 44.)

Certainly so much of the structure as extends beyond the present harbor line may not now be repaired without the permission of the Secretary of War. Being at present admittedly unsafe and unusable as an instrumentality of commerce, it is clearly, as found by the Secretary of War, a menace and not an aid to navigation, and no reason appears why it should not be removed by the Government without the payment of $50,000 demanded by appellant for its alleged rights in a derelict lying in navigable waters.

The question is, what has the owner lost, and not, what has the taker gained. (*Boston Chamber of Commerce* v. *Boston*, 217 U. S., 189, 195; *United States* v. *Chandler-Dunbar Co.*, 229 U. S., 53, 75.)

All appellant possessed was a revocable license. This license has been legally terminated. Neither appellant's access to deep water, nor any other riparian right, has been destroyed, but only brought closer to its land. Appellant, therefore, has lost nothing, and there has been no taking of private property for public use without just compensation.

The judgment of the Court of Appeals should be affirmed.

Respectfully,

E. MARVIN UNDERWOOD,
Assistant Attorney General.

FEBRUARY, 1915.

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